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Fairness in Anglo and Latin American Commercial Adjudication*

by Boris Kozolchyk**

I. INTRODUCTION

Whatever the meaning of fairness for the moral philosopher may be, legal and particularly judicial perceptions of commercial fairness fall into identifiable patterns when examined comparatively. This article explores the meaning of fairness in Anglo and Latin American commercial adjudication and summarizes some of the findings of a more comprehensive study to be published in the near future.¹

The initial segment of this study focused on the development of the law of usury in two European jurisdictions, England and Spain. Usury was chosen as the first study because this branch of the law has dealt, since ancient times, with the determination of what is the fair price, if any, for money lent. The usury study suggested the presence of three standards in varying degrees of

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1. The study, entitled "Legal Models of Fairness" was part of a law and social science research project supported by the National Science Foundation, Grant Gs-38286. The social science report is available as a chapter by Phillip E. Hammond and Kirk R. Williams, entitled *Moral Climates of Nations, Measurement and Classification*, in *THE RELIGIOUS DIMENSIONS IN QUANTITATIVE RESEARCH* (R. Wuthnow ed. 1979). The legal and social science studies were published separately as a result of the difficulties involved in integrating the respective data. Hammond's and Williams' study provides a general view of adjudicative criteria, including the degrees of political diversity and socioeconomic development, and it relies on statistical indices for 106 countries. The present study is confined essentially to one mechanism of adjudication for one type of dispute in a handful of representative jurisdictions. The author wishes to express his gratitude to the National Science Foundation and to the University of Arizona for its support of this project. In addition, the author is indebted for helpful commentary on an earlier draft of this summary to Professors David Clark, Dale Furnish, Marc Galanter, Nahum Glatzer, Carlos J. Gutierrez, E.A. Hoebel, Henning Jensen, Guillermo F. Margadant, Rudolf Schlesinger, Julius Stone, Daniel Swetschinsky, Robert S. Summers, Donald Wells, Norman Yoffee, and Jacob S. Ziegel; for research assistance to Alan Davidon, Mary Swallow and Eugenio L. Revilla; for useful suggestions to Zada Edgar, Paul Baier, John Baker and Chris Blakeley; and for editorial assistance to Billie Kozolchyk. Unless otherwise specified all translations are the author's.

predominance during each stage of the development of the law of usury. A "brotherly" standard (F1) required that the lender treat the borrower as if he were his brother, which in most instances meant that the loan had to be interest free. A "market" standard (F2) required that the borrower be charged the same rate of interest that other lenders customarily, that is to say, when acting as businessmen or with a view to their own advantage, charged their borrowers in their particular market. And a "stranger" standard (F3), which did not impose any restrictions on the manner in which a borrower could be treated, thereby equating his status to that of a non-member of the lender's family, religion, nation or marketplace. Usually, this meant that the borrower could be charged whatever rate the lender imposed.²

Subsequent studies on other areas of commercial law adjudication (broadly defined)³ confirmed the presence of the above standards, although their prevalence, as with the law of usury, varied from one representative jurisdiction to another. The following sections will describe the various versions of the fairness standards which prevail in United States statutory and decisional law and in representative Latin American jurisdictions. When required by the comparison, historical or prototype versions of fairness standards will be used.

II. A PROTOTYPE VERSION OF (F1): JEWISH MEDIEVAL COMMERCIAL *RESPONSA*

From the ninth to the thirteenth centuries, at a time at which trade across national boundaries as well as from one city or trading center in Europe, North Africa and the Middle East to another was a very risky undertaking,⁴ only those traders who trusted each other as brothers could count on long standing profitable relationships. Trust then was predicated upon a sense of religious and professional brotherhood, which was notable among Arab and Jewish merchants.⁵ Jewish medieval *responsa*, or answers to complex legal questions submitted to learned rabbis or Talmudic scholars by the judges in

2. The decision to study usury as a representative sample of the fairness criteria in due course lead to B. NELSON, *THE IDEA OF USURY* (1969). Nelson's painstaking description of the evolution of the meaning of usury from its tribal brotherhood origins to its modern conception of a "universal otherhood," including the changing meaning of "brotherhood" was very helpful in the formulation of the legal standards.

3. For purposes of this article "commercial" adjudication includes the transactions normally found in commercial codes in civil law countries. Thus, in addition to transactions covered by the U.C.C., it includes the sale of real property with an intent to profit, commission agency, brokerage, business associations and fiduciary transactions.

4. For a description of the perils in Mediterranean trade, see a collection of translated medieval letters in S.D. GOITEIN, *LETTERS OF MEDIEVAL JEWISH TRADERS* (1973). For a general description of trade conditions, customary terms and practices see 1-2 S.D. GOITEIN, *A MEDITERRANEAN SOCIETY — THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE ARAB GENIZA* (1967). For a description of northwestern European Jewish trade, see 1-2 I.A. AGUS, *URBAN CIVILIZATION IN PRE-CRUSADE EUROPE* (1965) (see especially 67, 78, 88) [hereinafter cited as Agus I or II].

5. For an insightful account of the meaning and role of "brotherhood," especially in instilling trust among Jewish and Arab merchants see, Goitein, *Formal Friendship in the Medieval Near East*, 15 *PROC. AM. PHILOSOPHICAL SOC.*, 484 (1971).

the various communities, clearly reflected the influence of the brotherhood notion. Thus,

whenever a Jew lost any money or property either by accident or through thievery . . . and another Jew found his property in the hands of a non Jew and bought it from him (even if) he did not know that his property originally belonged to a Jew, then if the original owner appeared and recognized his goods, the purchaser must return the goods to the original owner and is entitled to recoup only his disbursement.⁶

Similarly, and in order to prevent unscrupulous gentile creditors — pledgees from taking advantage of necessitous Jewish pledgors, a *responsum* recalled a restrictive ordinance that no one shall redeem (from a non Jew) the pledge of a fellow Jew.⁷

A Jewish merchant's business relationship with a non Jew was protected by bans and interdictions restraining other Jewish merchants from interfering with such a relationship (*maarufia*).⁸ Jewish co-adventurers or passengers in the same commercial voyage frequently protected a colleague's weak and necessitous dependents in the event of his death or incapacity by "picking up his bundle,"⁹ *i.e.*, transacting business on his behalf and turning the profits over to his surviving family. By encouraging trust, the brotherly standard also encouraged an efficient and highly predictable method of doing business, where formalities were rarely of the essence. Reliance on a brethren's word, and on his telling the truth, was a central feature not only of business practice but also of dispute settlement, since it generally was centered on the decissory oath.¹⁰

The Jewish medieval version of (F1) assumed that the trade relationships which gave rise to disputes arose primarily and preponderantly among a relatively small number of merchants, *i.e.*, brethren in the kinship or religious sense. The protection of the *maarufia* (exclusive dealership with gentiles) betrayed the scarcity and economic value of trade with non Jews. Yet, could a rule that required the original owner's recovery of lost or stolen property from a bona fide purchaser by merely paying the latter's costs of acquisition be acceptable where bona fide purchases are not only constantly being made but also encouraged? What if the bona fide purchasers themselves already had become liable to sub-purchasers for the delivery of the same item at a higher price than that offered as reimbursement by the original owner? Should not

6. *Responsum Shaare Zedek* 32 n.20, translated in Agus I, *supra* note 4, at 134-36.

7. *Responsum of Rabbenu Gershom*, in Agus I, *supra* note 4, at 206-07.

8. *Responsum of Rashi*, in Agus I, *supra* note 4, at 244.

9. *Anonymous Responsum from Sefer Hadinim of Rabbi Judah ha Cohen*, in Agus I, *supra* note 4, at 80-82.

10. For instances of reliance on the decissory oath in the *Responsa*, see Agus I, *supra* note 4, at 61; Agus II, *supra* note 4, at 48, 440; for a comparative evaluation of the oath in the Jewish and Islamic traditions, see Pedersen, *Der Eid bei den Semiten*, in *Seinem Verhältnis zu Verwandten Erscheinungen sowie die Stellung des Eides im Islam* 95-96 (1914).

the bona fide purchaser in such a situation be protected in his possession or reimbursed for his damages including his lost profits? Or, could the protection of *maarufia* be reconciled with a policy of encouragement of free trade and competition? Where, as in present day developed market economies, trade is among "non brethren" in a religious or kinship sense it would be unrealistic to impose brotherly duties on such a restricted basis. Whatever brotherly duties the legal systems choose to impose must therefore be predicated on broader or universalistic grounds.

III. CONTEMPORARY VERSIONS OF (F1)

A. Trustees in U.S. Law

A contemporary version of (F1) is found in the United States law that sets forth the duties of trustees and of parties whose superior knowledge or economic power places them in a position of dominance over other parties to the transaction. Unlike an ordinary contracting party, the trustee cannot claim that the absence of consideration for his management of the trust affairs is a valid excuse against the enforcement of a beneficiary's equitable rights and interests in the trust.¹¹ In transactions with third parties the trustee's diligence is measured against a "prudent man" standard; whereas in transactions with the beneficiary himself, or those involving the trustee's acquisition of trust property, the standard is much stricter. As stated in 1948 by the New York Surrogate Court in *In Re James Estate*: "When, however, the trustee acts in his own interest in connection with the performance of his duties as a trustee, the standard of behavior becomes more rigorous. In such a case, his interest must yield to that of the beneficiaries."¹²

B. Parties With Superior Knowledge in U.S. Law

In Re James Estate indicates that the rigorous standard described above applies not only to trustees but also to other parties, *e.g.*, attorneys in relation to their clients, whose functions are fiduciary because of their "superior knowledge" or of their transactional "dominance."¹³ Approximately twenty years ago, decisions began to appear with increasing frequency in the United States which also placed sellers and financiers of consumer transactions in a fiduciary or quasi-fiduciary position *vis-à-vis* ignorant consumers. For example in *Williams v. Walker Thomas Furniture Co.*,¹⁴ a case involving a furniture retailer as seller and a welfare recipient as a buyer of consumer goods, the

11. G. C. BOGERT & G. T. BOGERT, LAW OF TRUSTS (1973); *see also* RESTATEMENT (SECOND) OF THE LAW OF TRUSTS §§ 28-32 (1959).

12. *In re James' Estate*, 86 N.Y.S.2d 78, 89-90 (1948).

13. *Id.* at 87-88.

14. 350 F.2d 445 (D.C. Cir. 1965).

U.S. Court of Appeals for the District of Columbia defined unconscionability as "the absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹⁵ The court elaborated on what it meant by an absence of meaningful choice stating:

The manner in which the contract was entered into is also relevant to this consideration. Did each party to the contract considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sale practices?¹⁶

Another decision found inherent unconscionability and unfairness when the contractual weakness of the consumer resulted in a purchase price two and one half times the market value of the items purchased.¹⁷

C. *Mitigation of Damages in U.S. Law*

The preceding unconscionability cases were not the only instances in which merchants were made to act in a brotherly fashion; courts in the United States long have encouraged the mitigation of damages caused by breach of contract between buyers and sellers.¹⁸ Sellers whose goods are unjustifiably rejected by

15. *Id.* at 449.

16. *Id.* at 449-50.

17. In *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), the New Jersey trial court held that a contract for the sale of a freezer priced at more than two and one half times its market value was unenforceable because of fraud in its inception and because of the inherent unconscionability. On appeal, only the issue of fraud was decided, 108 N.J. Super 129, 260 A.2d 244 (App. Div. 1969); nonetheless the price charged had clearly shocked the court's conscience. 103 N.J. Super. at 504, 247 A.2d at 703. See also *Central Budget Corporation v. Sanchez* 53 Misc.2d 630, 279 N.Y.S.2d 391, 392 (N.Y.C. Civ. Ct. 1967) (which stands for the proposition that excessively high prices may trigger the application of U.C.C. § 2-302); *Toker v. Westerman* 113 N.J. Super. 452, 274 A.2d 78 (App. Div. 1970); and *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

18. See, e.g., *Sands v. Taylor*, 5 Johns. Cas. 393, 4 Am. Dec. 374 (New York Sup. Ct. 1810) where the buyer had refused to receive a substantial part of seller's shipment of wheat. The seller gave notice to the buyer that unless he received and paid for the entire wheat shipment the residue would be sold at public auction and the buyer would be held responsible for any deficiency. The New York court held that the sale of the wheat by the seller was not a waiver of his rights, the vendor being, by the refusal of the buyer to accept the wheat, at liberty to abandon it, or dispose of it *bona fide* as the buyer's agent to the best advantage. 5 Johns. Cas. at 405, 4 Am. Dec. at 375. Spencer, J., analyzed the vendor's position as follows:

they were, by necessity, made the defendants' trustees to manage it; and being thus constituted trustees, or agents, of the defendants, they must either abandon the property to destruction, by refusing to have any concern with it, or take a course more for the advantage of the defendants by selling it. There is a strong analogy between this case and that of the assured, in case of an abandonment. . . . In both cases, the party in possession is to be considered an agent to the other party, from necessity.

5 Johns. Cas. at 405-06, 4 Am. Dec. at 377. It is interesting that courts in as unsophisticated a commercial jurisdiction as Arizona was in 1892, had adopted the following rule:

buyers, or buyers whose payment of the purchase price is wrongly refused by sellers, are strongly encouraged to sell to or to buy from substitute parties, collecting as damages the difference between the price of the substitute and of the goods in the original transaction.¹⁹ The mitigation of damages caused by the other contracting party is reminiscent of the Jewish merchant's behavior when picking up his colleague's "bundle."²⁰ However, unlike the Jewish medieval trader, the mitigating United States seller or buyer is not an altruist. Far from being forced to suffer a possible loss or detriment in his mitigation, courts and legislatures in the United States have sought, punctiliously, to place the "aggrieved" party in the same position he would have been if the contract had been fully performed.²¹ In addition, by utilizing his assets in a "going concern" fashion, rather than by having them immobilized until final adjudication of the breach of contract or measure of damages, the "aggrieved" party's profitability increases over the long run. On the other hand, the United States merchant, just as the Jewish medieval trader, must concern himself with the other party's losses when required to exercise "reasonable commercial judgment for the purposes of avoiding loss."²²

In sum, two basic versions of (F1) can be discerned: the strict trustee version and the common benefit version. The first and strictest applies to trustees and to contracting parties acting with superior knowledge or enjoying a transactional dominance over weaker parties, and who are in a position to take advantage of such superior knowledge or contractual strength. This version demands that the trustee or dominating party act in the best interests of the beneficiary or weaker party. The second and less demanding standard sets

For a breach of a valid contract of sale by the vendee, in failing to accept the contract price, the vendor may treat the contract as a complete sale, and at his option either store the goods as the property of the vendee, or within a reasonable time resell in the open market. If he held the property for the vendee he may recover the full contract price. If he resells, the law deems him agent of the vendee, and he may apply the proceeds as payment pro tanto and, if less than the contract price, recover the difference. He may also treat the contract as executory, and the sale as not having vested title in the vendee, and retain property as his own, and may sue and recover any loss of profit had the contract price been paid. This would be the difference between the contract price and the market value at the time and place of delivery.

Slaughter v. Marlow, 3 Ariz. 429, 31 P. 547 (1892).

19. See *Mays Mills v. McRae*, 187 N.C. 707, 122 S.E. 762 (1924) (where it was held that the recipient of the repudiation should not continue with his performance if doing so would increase damages); see also U.C.C. § 2-709(1)(b) (which requires the seller to employ a reasonable effort to resell the goods at a reasonable price or to prove that circumstances indicate that such efforts would be unavailing, to be entitled to the action on the price or the similar rule on the buyer's right to specific performance or replevin); U.C.C. § 2-716.

20. See the language by Spencer, J., quoted in note 18 *supra* where he draws an analogy between the "necessity" of an assured in the abandonment of goods and that of the repudiating party, both requiring in his view the innocent party's agency or trusteeship with regard to the goods.

21. See, e.g., seller's remedy of damages under U.C.C. § 2-708(1)(2).

22. U.C.C. § 2-704(2).

forth a duty of care which is not at the expense of one's assets. On the contrary, it presupposes a common benefit, or altruism motivated by self interest. It generally is applicable to merchants and to situations where both parties stand to gain from the brotherly conduct.

D. Trustees and Superior Knowledge in Mexican and Costa Rican Law

Latin Americans rightly are regarded as warm and hospitable people. In addition, in this writer's experience, family and friendship imply a deeper emotional and financial commitment in Latin America than is normally the case in other, more economically developed regions. Yet, (F1) seems, on the whole, absent from Latin American commercial adjudication.

Mexico is one of the few Latin American jurisdictions to have adopted the equivalent of the Anglo-American trust.²³ Mexican statutory rules provide that a trustee must discharge his trusteeship in accordance with instructions provided in the trust instrument, and, in following these instructions, he must have the diligence of "a good father of family."²⁴ According to a leading authority, the "good father of family" standard was intended as a contemporary version of the Roman standard for "*bonae fidei negotia*," which applied when, regardless of express stipulations, the parties were bound to employ a high level of diligence (*summa u omnis diligentia*).²⁵ Implicit in the standard applied to the *bonae fidei negotia* was a healthy exercise of the obligor's discretion. This discretion was foreign to the so-called *stricti juris negotia* where the main question was the extent to which the obligor violated explicit instructions.²⁶

23. On Mexican law see Ley General de Títulos y Operaciones de Crédito de 26 de agosto de 1932 [hereinafter cited as Mexican LTOC] (wherein the bulk of present statutory rules on trusts are found), and its 1926 antecedents, Ley de Bancos de Fideicomiso, de 30 de junio de 1926, and Ley General de Instituciones de Crédito y Establecimientos Bancarios, de 31 de agosto de 1926. A very influential Panamanian draft of a trust law was prepared in 1920 by the distinguished jurist R. ALFARO, PROYECTO DE LEY DE FIDEICOMISO (Panama 1920). Statutory rules on the trust are found, among others, in Costa Rica, Ley de Fideicomisos de 13 de noviembre de 1937, and more recently in the CÓDIGO DE COMERCIO DE 1964 arts. 633-62 (Costa Rica); in Ecuador, Ley General de Bancos, 17 de marzo de 1948 (Ecuador); in El Salvador, CÓDIGO DE COMERCIO, Lib. IV, tit. VII, cap. VII, (1970); in Guatemala, Ley de Bancos, No. 315 de 5 de diciembre de 1946, CÓDIGO DE COMERCIO DE 1952 (Guatemala); in Honduras, CÓDIGO DE COMERCIO DE 1950 arts. 1033-62 (Honduras); in Nicaragua, Ley General de Instituciones Bancarias, de 26 de octubre 1940, reformada por la Ley No. 158 de 4 de agosto de 1941; in Venezuela, Ley de Fideicomisos de 25 de julio de 1956. For a survey on Latin American trust legislation, see R. BATIZA, EL FIDEICOMISO, TEORÍA Y PRÁCTICA 65-68 (México, D.F., 1973) [hereinafter cited as BATIZA]; for earlier surveys, see 3 B. KOZOLCHYK & O. TORREALBA, CURSO DE DERECHO MERCANTIL 34-40 (Costa Rica 1968) [hereinafter cited as KOZOLCHYK & TORREALBA]; R. GOLDSCHMIDT, EL FIDEICOMISO EN LOS PAÍSES DE LA AMÉRICA LATINA, NUEVOS ESTUDIOS DE DERECHO COMPARADO 129-161 (Venezuela 1962).

24. See Mexican LTOC, *supra* note 23, art. 356; BATIZA, *supra* note 23, at 179-80.

25. See BATIZA, *supra* note 23, at 179-80.

26. *Id.*

An examination of Mexican court decisions reveals that they evaluate the trustee's diligence almost exclusively in terms of faithfulness to the letter of the settlor's instructions or of numerous administrative regulations rather than on what a "good father of family" would have done where discretion could have been exercised profitably.²⁷ Consequently, a Mexican trustee need not act as a "good father of family" in buying or selling a given asset if he could show that his inaction was dictated by a faithful, if not literal, observance of an ill conceived or drawn instruction or administrative regulation.²⁸ In contrast with U.S. law, the trustee is not encouraged to substitute his professional and more immediate knowledge of the circumstances surrounding each act or transaction for that of the settlor or administrative official.²⁹

The question then arises of what standard applies to a Mexican trustee who enters into a self-interested transaction with his beneficiary or one involving beneficiary's assets. In the absence of a specific statutory or administrative rule, one can surmise the Mexican legislator's attitude only from the prohibition that applies to a similar transaction by a guardian:

Not even with judicial permission, with or without public bidding, can the guardian acquire or lease properties of the ward (incompetent), nor enter into any contract with respect to such property for himself, his ascendants, his wife, children or brothers or sisters by consanguinity or affinity. Should he do so, in addition to the nullity of the contract, the act shall be sufficient to cause his removal.³⁰

Thus, in contrast with the attitude apparent in *In Re James Estate*,³¹ where the United States trustee, as a party with superior knowledge, was allowed to deal with the property of the beneficiary provided he complied with the strictest version of (F1), the Mexican legislature seems unwilling both to trust the guardian in self-interested types of transactions, and to use (F1) as a device with which to insure that the trust is not misused.

A 1938 Costa Rican Supreme Court decision provides an illustration of the need for an (F1) standard in transactions where parties of inferior knowledge entrust their assets to others of superior knowledge. A Costa Rican notary public, who was also an executor (*albacea*) of an estate, in his role as executor sold property of the estate to a third party, and, at the same time, acting as a

27. See, e.g., Esparza de Sanchez Leonor, Sec. la, [1954] 119-II Semanario 1119; Acosta Sierra Francisco, Sec. 2a, [1952] 118-II Semanario 1082. For a discussion of some of the administrative regulations governing the discretion of Mexican trustees (which according to the LTOC can only be banking institutions), see BATIZA, *supra* note 23, at 207-11.

28. See BATIZA, *supra* note 23, at 193-94 (see especially note 359 discussing the curtailing effect on an investment trustee's discretion by Mexican banking law).

29. *Id.*

30. CÓDIGO CIVIL DE 1928 art. 569 (Mex.).

31. See text accompanying note 12 *supra*.

notary public, executed and issued the notarial or public deed documenting the conveyance.³² The land registrar refused to record the deed because Costa Rican notarial law required that a notary who acts as an agent or representative for the sale of property cannot be, at the same time, the notary public for the transaction.³³ On appeal, the Supreme Court of Costa Rica rejected the conflict of interest argument and stated that if the notary gives

faith of the authenticity of the sales price on the basis of an expert witness' appraisal, and refers to the judicial authorization of the sale, as well as to his appointment as an executor, we cannot see how the notary's impartiality could be compromised, especially since no transaction was made on his own behalf or on behalf of his relatives. . . .³⁴

The Supreme Court of Costa Rica did not inquire whether the estate had paid higher notarial fees or transactional costs than would have been involved had a notary been selected after determining whose fees were the lowest.³⁵ Higher fees may well have been avoided if the notary in question was required to prove that when undertaking such a self-interested transaction his interest, as that of the trustee in *In Re James Estate*, unquestionably yielded to that of the heirs.

E. *Superior Bargaining Power and Lesion in Mexican Law*

Article 17 of the Mexican Civil Code for the Federal District and Territories of 1928 sets forth the doctrine of lesion as follows:

When any person, taking advantage of the supreme ignorance, notorious inexperience or extreme poverty of another, obtains an excessive profit which is evidently disproportionate to the obligations assumed by him, the person damaged has the right to demand the rescission of the contract and if this is impossible, an equitable reduction of his obligation. . . .³⁶

In light of such a categorical provision, one could have expected many *Walker Thomas*³⁷ type of decisions by Mexico's appellate courts. Yet, very few deci-

32. Ugalde Gamboa y Otro v. Registro Público de la Propiedad, Suprema Corte Justicia, Casación, Costa Rica, 15 de Agosto, 1938, [1938] II Seminario 1494, *reprinted in* O.A. SALAS, DERECHO NOTARIAL DE CENTROAMERICA Y PANAMÁ 163-67 (Costa Rica 1973) [hereinafter cited as SALAS].

33. SALAS, *supra* note 32, at 164.

34. *Id.* at 166.

35. For a typical fee schedule (*arancel*), see SALAS, *supra* note 32, at 447-50, where fee schedules are set forth in an "up to" (*hasta*) a maximum amount basis for category of deed or instrument.

36. V. BAKER, THE CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES OF MEXICO 481 (O. Schoenrich trans. 1950).

37. See text accompanying note 14 *supra*.

sions applying Article 17 that have been rendered and their degree of consumer protection is, at best, questionable. According to prevailing doctrinal opinion, Mexican Commercial Code Article 385, which precludes the application of lesion to "commercial sales,"³⁸ applies to "mixed" transactions, *i.e.*, where the sale is commercial for one of the parties and "civil" or not commercial for the other.³⁹ Consequently, the protection of Article 17 is withdrawn from consumer purchasers or "from the weaker party when it is most needed, *i.e.*, when he deals with an expert."⁴⁰ Moreover, decisions applying Article 17 (mostly on the sale of land for a price considerably lower than market) require both an "objective" as well as a "subjective" element.⁴¹ The subjective element is determined by the degree of ignorance, inexperience or poverty of the weaker party. The objective element refers to the excessive profit in evident disproportion to the obligation assumed by the stronger party.⁴² Even when a Mexican consumer could claim subjective lesion, he would not succeed if he cannot prove that the defendant profited excessively. In other words, where goods have been sold at a price sufficiently close to market value, the protection of Article 17 cannot be invoked. This would be true even though payment of the purchase price was secured by an excessive or abusive security interest,

38. CÓDIGO DE COMMERICO art. 385 (Mex.) provides:

Commercial sales shall not be rescinded because of lesion; the aggrieved party however may resort, in addition to the corresponding criminal action, to an action on damages against the contracting party that acted with evil intent (*dolo o malicia*) in entering into the contract or in performing under it.

39. For a comparative discussion of the application of Article 385 of the Mexican Commercial Code, see Warren, *Mexican Retail Installment Sales Law: A Comparative Study*, 10 U.C.L.A. L. REV. 15, 53-57 (1962). The view that seems to have been the most influential in Mexico was expressed by J. RODRIGUEZ Y RODRIGUEZ, CURSO DE DERECHO MERCANTIL 9 (Monterrey 1947). *But cf.* R. L. MANTILLA MOLINA, DERECHO MERCANTIL 73 (14th ed. Mexico, D.F. 1974) where this highly regarded author states:

Article 1050 of the Mexican Commercial Code (which states that the application of the commercial procedural rules depend upon whether the defendant entered into a commercial or civil act) only partially resolves the choice of law question, for it refers only to procedural rules; it does not address the choice of substantive law. . . . In my opinion, the obligations of the party for whom the transaction does not entail an act of commerce are governed exclusively by the civil law. In order to subject such obligations to the commercial law there would have to be an express provision decreeing such a submission, which in our law does not exist. . . .

Id. at 73 (parenthesis added).

40. R. SCHLESINGER, COMPARATIVE LAW 409 (3d ed. 1970).

41. See, *e.g.*, Luis Moreno Montes de Oca, Suprema Corte de Justicia, [1966] 101 Semanario 27: "For the existence of lesion, as referred to in Article 17 of the Civil Code of the Federal District, it is not enough that there be a notorious disproportion in the price, but it is also necessary that there be an abuse of the misery, ignorance or inexperience of the victim." For a similar statement see, Antonio Gantus, Suprema Corte de Justicia, [1956] 127 Semanario Indices 807; Maria Concepción Olguín, Suprema Corte de Justicia, [1970] Jurisprudencia y Tesis Sobresalientes 1966-70, Actualización II Civil (Mex.).

42. *Id.*

or the seller knew or should have known that the goods involved should not have been purchased on terms agreed upon by the buyer.⁴³ Finally, despite the reference to "extreme poverty" in Article 17, Mexican doctrinal opinion is that economic duress is not within the protection of Article 17.⁴⁴

F. *Mitigation of Contractual Damages in Costa Rican and Mexican Law*

The Costa Rican and Mexican Supreme Courts have denied until quite recently the exercise of the remedy of resale by an aggrieved seller or of cover (repurchase) by an aggrieved buyer even when the parties contractually stipulated the grounds for rescission.⁴⁵ As stated by the Costa Rican Supreme Court in a 1945 decision:

43. The situation described in the principal text is that in the *Walker Thomas* decision discussed in the text accompanying note 14 *supra*.

44. E. GUTIERREZ GONZALEZ, *DERECHO DE LAS OBLIGACIONES* 315-16 (Cajica 5th ed. 1976) [hereinafter cited as GUTIERREZ GONZALEZ]:

It is laudable that the legislature try to defend the weak from abuse by the powerful, the poor from the rich etc., but it omitted from such a defense those who without being poor, ignorant or inexperienced may at a given time face extreme necessity, which will allow the other party to take advantage of the situation and obtain a disproportionate profit.

But cf. Flores Barroeta, *Voluntad Contractual y Derecho Mexicano*, BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO, Sept.-Dec. 1965, at 699, 719 [hereinafter cited as Flores Barroeta], who contrasts the rules on economic duress under which French and Mexican courts operate as follows:

Mexican law has not found it necessary to rely on extensive types of interpretation in the subject matter of duress because the state of necessity, which French court decisions have included under the heading of duress is clearly contemplated by our legislation on lesion, which is not the case in French law. . . .

Judging from the absence of reported Mexican decisions on the type of necessity described by Gutierrez Gonzales, which he distinguished from poverty, it would seem that Mexican Courts read Article 17 as he does. For a description of French and German courts pre-World War II decisions and attitudes toward economic duress see Dawson, *Economic Duress and Fair Exchange in French and German Law*, 12 TUL. L. REV. 42 (1937) [hereinafter cited as Dawson].

45. In Costa Rica, the decision which may be the turning point against the doctrine that the remedy of resale is only available by court authorization is *Cueromat v. Grunhaus Perlmutter*, Sala de Casación, 9 de abril de 1953, reprinted in 2 KOZOLCHYK & TORREALBA, *supra* note 23, at 115, 129, where the Supreme Court states:

Plaintiff fulfilled its part of the bargain placing at the disposal of defendant the sold merchandise (at National Customs) . . . defendant, since the first shipment, clearly repudiated. Such a breach allows plaintiff's claim based on articles 312 of the Commercial Code and 692 of the Civil Code. Plaintiff's right is not impaired by his authorization of a resale given to a representative agent in Costa Rica because this authorization was prompted by defendant's refusal to withdraw the merchandise from customs, and faced with custom's warning that the merchandise would have to be sold to pay for storage charges. . . . Thus, when the plaintiff resold to reduce the damages owned by defendant he has not waived the right to claim the rescission of the contract and damages as provided in Article 692.

The court referred to the established case law doctrine (since 1917) denying the resale except

once again we must set forth the principle that the rescission that emerges from rescissory clause, be it the result of an express agreement or of a tacit understanding . . . can never operate with full legal import [*de pleno derecho*]. The reason is elementary. Neither the court, nor the parties are at liberty to ignore the resulting inequity. For it would be up to the seller to demand or not to demand before the courts the fulfillment of the obligation (payment of the purchase price) or its rescission according to whether the sold property would have gone up or down in value.⁴⁶

It should not go unnoticed that the same remedy which the Costa Rican Supreme Court considered inequitable is regarded as eminently fair by courts in the United States. While the Costa Rican Supreme Court regards as inequitable the fact that the aggrieved party has the choice to bring or not to bring an action for breach of contract or specific performance (depending upon the market value of the goods), this choice is deemed desirable in United States common and statutory law.⁴⁷ Moreover, precisely because the possibility of market price fluctuation is inherent in the delayed choice and with it unnecessary accumulation of damages, U.S. law encourages the aggrieved party to resell or "cover" as quickly as possible.

In contrast, a 1957 Mexican Supreme Court decision held (as in Costa Rica) that a seller's resale upon learning of the buyer's anticipatory breach was invalid because it was predicated on "a nonexistent right, (thus) the seller was responsible for the buyer's damages as a result of such a resale."⁴⁸ In 1964 the Mexican Supreme Court went so far as to hold a seller who resold real

upon court approval, but stated that since the action on rescission is at root equitable, equity considerations should allow the resale when the circumstances of the case warrant it. It is very significant that a 1922 decision by the same Supreme Court had referred to the difference between Costa Rican and French courts' attitudes toward extra-judicial rescission as caused by the fact that French law "does not give the creditor a perfect right to rescind and transforms the judge who hears the declarative trial, in a sense, into a judge of equity, whereas Art. 692 of the Civil Code of Costa Rica is precise and unconditional. . . ." Transcript of Sentencia de la Sala de Casación de 19 de Diciembre de 1922, reprinted in P. CASAFONT ROMERO, ENSAYOS DE DERECHO CONTRACTUAL 56 (Costa Rica 1956) [hereinafter cited as CASAFONT ROMERO]. It should be recalled that a similar justification had been advanced by a Mexican author as to why it was not necessary for Mexican courts to act as courts of equity with regard to economic duress, see Flores Barroeta, *supra* note 44. The Mexican Supreme Court decision credited with validating an express stipulation allowing for extra judicial rescission is Banco Nacional de Crédito Ejidal, S.A., Suprema Corte de Justicia, [1955] 122-23 Semanario 538, holding reprinted in GUTIERREZ GONZALEZ, *supra* note 44, at 534; see Mexico Tractor and Machinery Co. S.A., Suprema Corte de Justicia, [1957] 1 Semanario 119, holding reprinted in GUTIERREZ GONZALEZ, *supra* note 44, at 535; see also the pioneering article by Headrick, *La Rescisión de la Compraventa*, REV. DE LA FAC. DE DERECHO DE LA U.N.A.M. Feb.-Mar. 1963, at 83, 89 [hereinafter cited as Headrick].

46. Tribunal de Casación, Sentencia de 4 de Agosto de 1945, reprinted in *resolutive part* in CASAFONT ROMERO, *supra* note 45, at 44-45.

47. See notes 18-22 *supra* and accompanying text.

48. See Mexico Tractor, *supra* note 45, and comment thereto in Headrick, *supra* note 45, at 87, 89.

property upon indications of the buyer's anticipatory breach "guilty of the crime of fraud."⁴⁹ Such a seller was not relieved of culpability by the assertion that the buyer had failed to perform his obligations in a draft agreement. The fact that the buyer did not comply with his obligations, in the court's words, "does not give the accused the right to treat the contract as rescinded. For he has the right to bring an appropriate action before the judicial authority. . . ."⁵⁰ It was not until 1955 that the Supreme Court of Mexico clearly decided that a contractual stipulation setting forth the grounds for rescission was enforceable, but this was limited to contracts which contained "express" rescissory stipulations.⁵¹

IV. COMPARATIVE EVALUATION OF UNITED STATES AND LATIN AMERICAN (F1) VERSIONS

The examinations of the (F1) prototype version in Jewish medieval *responsa* indicated that the standard was, by definition, restrictive or incompatible with a universal definition of "brotherhood." It also indicated that (F1) was inextricably tied to trust. The standard was applied to those who could be trusted (brethren in the religious sense) and by applying it, *i.e.*, by demanding brotherly conduct, trust was fostered.

The (F1) versions in United States law indicate that the standard is still applied in a restrictive fashion, but the brotherhood is no longer predicated on a religious, familial or tribal duty. In the U.S. it is predicated on the professional responsibility of trustees, parties with superior knowledge or contractual dominance toward weaker parties. It also applies, but not as strictly, to certain aspects of commercial transactions among merchants, *e.g.*, where their contractual losses are required to be minimized. As with medieval Jewish *responsa* law, United States law trusts certain parties to act in a brotherly fashion and insures such trust by imposing an accountability whose brotherly strictness increases with the degree of self-interest present in the transaction in question.

The Latin American statutory and decisional law reflects an unwillingness to trust the trustee when acting in discretionary and especially self-interested transactions. This attitude results in economic harm to the beneficiary or ward when the trustee's self-interest is consistent with, or subordinated to, that of the beneficiary. A court will, in all likelihood, prevent the acquisition of a beneficiary's property by a trustee or a guardian even though this transaction could be proven considerably more beneficial to the beneficiary than any other

49. Pedro J. Gonzalez, Suprema Corte de Justicia, [1964] 80-II Semanario 23, *translated in* W. L. Butte, *Selected Mexican Cases* 303 (Univ. of Texas, School of Law, Mimeo, 1970) [hereinafter cited as Butte].

50. *Id.*

51. *See Banco Nacional*, *supra* note 45.

available in the open market. Similarly the statutory language, "nor enter into any contract with respect of such property (beneficiary's) for himself, his ascendants, wife, children,"⁵² prevents an acquisition of a highly profitable business interest merely because the trustee or his family are partners, shareholders, or participants in such a business.

In contrast with the Mexican legislative, judicial and doctrinal attitude, the German Civil Code enjoins the tutor from using the ward's estate for himself.⁵³ However, after listing the approved types of investments, the German codifier vested authority to sanction investments other than those expressly listed in the guardianship courts, when special circumstances required such investments.⁵⁴ Subsequent legislation made it clear that the court's approval could be denied only if the proposed investment, according to the circumstances of each case, was contrary to sound economic management.⁵⁵

The comparison with German law in the area of lesion is also enlightening. Despite the fact that Article 138 of the German Civil Code was a model for the drafting of Mexican Code Article 17, its German interpretation contrasts sharply with that of Mexico. A classic study⁵⁶ of pre-Second World War German lesion decisions refers to one case in which a member of a wealthy family purchased goods at the defendant's store after the defendant was notified that the plaintiff was about to put the purchaser under guardianship as a spendthrift. The court held that the defendant's securing of the same prices from other customers was no bar to avoiding the transaction because of lesion, if expert testimony established that defendant's prices were excessive by the standards of "honest merchants."⁵⁷ Other decisions reflect the attitudes of German courts toward transactions involving needy purchasers. Typically, these decisions involve the so-called "state of necessity,"⁵⁸ and even though the German *Reichsgericht* in the state of necessity cases considered the entire economic situation of the needy party, it also held that "a merely temporary stringency, if sufficiently severe, might destroy the bargaining power of a person possessed of considerable financial resources".⁵⁹ Ignorance, or inexperience, was defined, as early as 1905 by the *Reichsgericht*, as including that of "a simple workman who was so inexperienced that a purchase of fertilizer at excessive price was void."⁶⁰ Similarly, the attitude of German statutory and decisional

52. See text accompanying note 30 *supra*.

53. I. FORRESTER, S. L. GOREN & H. M. ILGEN, GERMAN CIVIL CODE art. 1805, at 279 (1975).

54. *Id.*, arts. 1807, 1808, 1811, at 279, 280.

55. PALANDT, BÜRGERLICHES GESETZBUCH § 1811, annot.(1)(b), at 1604 (1977).

56. Dawson, *supra* note 44.

57. *Id.* at 57 n.161, citing Judgment of April 18, 1905, Reichsgericht, [1905] Juristische Wochenschrift 366.

58. Dawson, *supra* note 44, at 62.

59. *Id.*

60. Judgment of Jan. 7, 1905, [1905] 60 Reichsgericht Zeitung 9, cited by Dawson note 44, at 63 n.178.

law on mitigation of damages contrasts with Costa Rica's and Mexico's and is much closer to that which prevails in the United States.⁶¹

It would seem, therefore, that the presence or absence of (F1) or the prevalence of any of its versions for given types of transactions is not the result of the representative jurisdiction's affiliation with what has been traditionally described as a civil or common law "legal system." Instead, the application of (F1) depends on the prevailing attitudes among legislators and judges with respect to who could be trusted to act as a brother in a commercial transaction.

V. (F2) IN UNITED STATES COMMERCIAL LAW

A. *Introduction*

(F2) is the standard which requires that a party to a transaction treat the others in accordance with the manner in which most participants in that transaction and marketplace with a view to their own advantage treat each other. It is the standard that prevails in United States commercial law adjudication. It is used in contractual disputes, among other purposes, to determine the meaning of contractual intent, the adequacy or sufficiency of reciprocal performances and the availability of remedies and measure of recovery in the event of a breach of contract. It is used also in disputes involving "third" parties or parties other than those in "privity" or contractual relationship with each other, to determine who is entitled to immediate or permanent possession of disputed property.

B. *Contractual Disputes*

From a judicial standpoint, contractual intent, the key conceptual device in U.S. contractual adjudication, is not necessarily synonymous with the plain meaning of the express terms of a contract if the contract was entered into by merchants or by regular participants in the market type transaction. In *Columbia Nitrogen Corp. v. Royster Co.*,⁶² for example, the contract explicitly stated a price per ton of phosphate, subject to an escalation clause dependent upon production costs. Appellant offered the testimony of witnesses whom the appellate court described as having "long experience in the trade"⁶³ to argue

61. 2 E. J. COHN, *MANUAL OF GERMAN LAW* 39 (London 1971) states:

In a commercial sale, irrespective of what has been sold, the seller is entitled to deposit the goods in a warehouse or at another safe place at the buyer's risk or expense, or having given the buyer warning, sell the goods or documents by public auction (Section 383(3) BGB); . . . No warning is required where the goods are perishable or where a warning would be impracticable (untunlich). Where there is a market price, the sale can be effected through an authorized broker.

A comparison of Article 373 of the German Commercial Code of 1900, *HANDELS GESETZBUCH* art. 373 (Ger. 1900), with U.C.C. § 2-706 reveals a remarkably similar approach to seller's remedy of resale explained, perhaps, by Karl Llewellyn's exposure to German law.

62. 451 F.2d 3 (4th Cir. 1971).

63. *Id.* at 7.

that because of uncertain crop and weather conditions, the stipulation of express price and quantity terms in contracts for materials in the mixed fertilizer market are "mere projections to be adjusted according to market forces."⁶⁴ The district court held that the evidence should be excluded stating that "custom and usage or course of dealing are not admissible to contradict express, plain, unambiguous language of a valid written contract, which by virtue of its detail negates the proposition that the contract is open to variances in its terms."⁶⁵ The appellate court reversed, holding that, consistent with the legislative attitude apparent in the official comment to U.C.C. § 2-202, "course of dealing and usage of trade, unless carefully negated, are admissible to supplement the terms of any writing," and that "contracts are to be read on the assumption that these elements were taken for granted when the document was phrased."⁶⁶

Granted that the Fourth Circuit's reading of the term "supplement" is broad enough to include not only an addition but also a negation of the apparent or "plain" meaning of stipulations, the fact remains that this decision is representative of judicial attitudes in the United States. The trend in the United States, despite the parol evidence rule, is to establish the meaning of contractual intent not merely by resort to lay dictionaries or by searching for the "internal logic" of a contract, but by going outside the contract to establish what is "reasonable" under the circumstances. This is frequently just another term for what is most commonly done by the parties or by most participants in the trade or marketplace.⁶⁷ Thus, even when a court attempts to define a term as susceptible to a plain or unambiguous meaning as "chicken" by resort to a dictionary, or to the contract's internal logic, it ultimately relies on a market consideration such as the following:

It is scarcely an answer to say, as plaintiff does in its brief, that the 33¢ price offered for the 2½-3 lb. chickens was closer to the prevailing 35¢ price for broilers than to the 30¢ at which defendant pro-

64. *Id.*

65. *Id.* at 8.

66. *Id.* at 10-11. The court had established already that in accordance with the official comment to 2-202 the section "rejected the old rule that evidence of course of dealing or usage of trade can be introduced only when the contract is ambiguous." *Id.* at 9.

67. For the importance of course of dealing see *Skeels v. Universal C.I.T. Credit Corp.* 222 F. Supp. 696 (W.D. Pa, 1963) (where course of dealing was used by the court to modify the literal terms used by the parties). The market also supplies the meaning of missing terms of such significance as the price in U.C.C. adjudication. See, e.g., Llewellyn's Memorandum Replying to the Report of Task Group 1 of the Special Committee of the Commerce and Industry Association of New York Inc., on the Uniform Commercial Code, 1 N.Y. STATE LAW REVISION COMM'N, 1954 REPORT 106, 117-18 (1954):

You can be inaccurate about other things or leave them out. You refer to the market—you have to keep the jury from going crazy. You can't swear too much of a price onto a guy where there is a market around to test whether or not it is likely that that was the term agreed upon.

cured fowl. Plaintiff must have expected defendant to make some profit — certainly it could not have expected defendant deliberately to incur a loss.⁶⁸

In other words, even when the question is as seemingly unambiguous as what the contractual meaning of “chicken” is, the intent of the parties is determined by asking what would a merchant, acting as a regular participant in a market transaction, viewing his own advantage, have meant by the term “chicken”?

Reasonableness in the sense of market-like behavior also governs the determination of whether a seller or a buyer can claim the specific performance of a contract as contrasted with the damages resulting from a resale to or repurchase from another contracting party, or from the rescission of the contract.⁶⁹ It also governs questions on the appropriate time to secure the substitute performance or place at which to buy or sell the substituted goods.⁷⁰

C. *Third Party Rights*

The rights of parties, such as bona fide purchasers of property (including negotiable instruments or other types of commercial paper) as well as the rights of creditors who advance money on the security of the debtor's personal or real property, are predicated upon the giving of value. This is a concept which is deeply influenced by market considerations. Despite the U.C.C.'s definition of value as constituting generally “any consideration sufficient to support a simple contract,”⁷¹ the U.C.C. does not regard a “taking” of a negotiable instrument as “for value” unless the agreed consideration had been performed. . . .⁷² Reflecting the same attitude, courts in the United States have held since the turn of the century that the negotiation of an instrument in consideration of the giving of credit to the depositor of a check is not a giving for value within the meaning of negotiable instruments law.⁷³ An actual purchase from the depositor was required to qualify the bank as a holder for

68. *Frigalment Importing Co., Ltd., v. B.N.S. International Sales Corp.*, 190 F. Supp. 116, 120 (S.D.N.Y. 1960).

69. See note 19 *supra*.

70. See, e.g., U.C.C. §§ 2-706, 2-712.

71. See U.C.C. § 1-201(44).

72. See U.C.C. § 3-303.

73. See *Citizens' State Bank v. Cowles*, 180 N.Y. 346, 73 N.E. 33 (1905) construing *inter alia*, Sections 52(3), 191(12) and 25 of the Uniform Negotiable Instruments Law on the meaning of value and holding:

if the evidence would support the inference that the plaintiff did not buy the check, but simply gave Hoffman credit for the amount upon its books, then the plaintiff is not a holder in due course, within the law merchant, as that term is now defined in the Negotiable Instruments Law. . . .

180 N.Y. at 348-49, 73 N.E. at 33. For similar holdings see cases cited by W.E. BRITTON, *CASES OF THE LAW OF BILLS AND NOTES* 216 n.7 (1961).

value.⁷⁴ The rights of the third party, known as a holder for value of a negotiable instrument, are measured then not merely by his having suffered an ascertainable detriment, but by his having given something which to most participants in the acquisition of commercial paper is valuable.

Similarly, despite the supposed applicability of the "simple contract" consideration concept of value to Article 9 secured transactions,⁷⁵ the type of value which warrants priority in Article 9 is not antecedent value but "new value." Although not expressly defined, this concept likewise bears a market imprint. For example, a purchase money security interest, one of the code's favorite security interests, is created

to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price; or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.⁷⁶

Consequently, the value that makes it possible for the buyer to purchase on credit will be preferred over a less instrumental (from a market standpoint) advance or obligation. Priorities will be arranged according to a principle of specificity: The more specific the contribution to the marketable value of the "collateral" in question, the higher its priority.⁷⁷ It must be noted that in ascribing a preeminent role in these disputes involving secured creditors and

74. *Id.*

75. See U.C.C. § 9-108.

76. U.C.C. § 9-107; see U.C.C. § 9-312(3), (4), and Comments 3, 4; 2 G. GILMORE, SECURITIES INTERESTS IN PERSONAL PROPERTY 782 (1965) [hereinafter cited as GILMORE]; J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 914-16 (1972).

77. See U.C.C. § 9-312, Comments 2, 3. For an extension of the "enabling" rationale present in the protection of a purchase money security interest creditor to the conflict between a judgment lienor whose lien predates a "future advance" by a secured creditor who relies on the same collateral as is affected by the lien see GILMORE, *supra* note 76, at 939:

to what extent is the lienor harmed by being subordinated to legitimate future advances (obligatory or voluntary) made under an existing loan agreement? We have hypothesized successive loans on April 1 and May 1 with a lien attaching on April 15. If the lienor has the machinery sold, he will succeed in reaching the debtor's equity in the machinery (its value less the April 1 loan if we have no other interest to worry about). If he delays the sale until after May 1, he will still reach the debtor's equity, but that will now have been diminished by the May 1 loan. However, the debtor's assets have not been depleted: the May 1 advance balances the diminution of his equity in the machinery. The lienor will now receive less from the sale of the machinery than he would have received before May 1, but his chance of collecting his claim from the debtor's remaining assets (which now include the May 1 advance) is as good as ever; presumably it is better than ever since the debtor now has a new supply of working capital.

The preceding passage by one of the most qualified analysts of Anglo-American secured transactions law clearly reveals the policy of balancing both the contribution to marketable value of the

purchasers of personal property to the giving of value, United States common and statutory law deemphasized the role of title as the decisive finding.⁷⁸ What used to be decided in the nineteenth century on the basis of who was the "rightful" owner, who had "retained ownership" or who has acquired title from the owner is seldom decided on such a basis presently. The giving of the most specific value coupled with the giving of actual or constructive notice to the third parties, who are likely to give value, are now the key determinants in U.S. law.⁷⁹

VI. (F2) IN LATIN AMERICAN COMMERCIAL LAW

A. Introduction

(F2) is used in Latin American commercial adjudication and is apparent in some Argentine and Costa Rican decisions,⁸⁰ but its application is neither as widespread nor as determinative of the outcome of the controversy as it is in United States common law, especially if it is at odds with the intent expressed in formal deeds or documents. The overwhelming evidentiary weight of Public Deeds (*Escrituras Públicas*) in Latin American procedural law, and the widespread use of these deeds in significant commercial transactions (which are the ones most likely to be litigated) contributes to the restricted role of parol evidence, course of dealing and of usage of trade. The attitude of Latin American courts toward contractual obligations will be illustrated by reference to Mexican, Argentine and Chilean decisions.

collateral (where the secured creditor is concerned) and the preservation of attachable assets where an unsecured judgment lienor is concerned.

78. See U.C.C. § 9-202, and Comment thereto; U.C.C. § 9-312, Comment 3.

79. See notably U.C.C. §§ 9-312, 9-313.

80. In Argentine law see, e.g., *Banco Polaco Polska Kasa Opieki v. Van der Velde y Wrange*, [1942] 2 *Jurisprudencia Argentina* [J.A.] 242, 248 as crucial a banking and negotiable instruments law question, whether in the absence of an express stipulation the negotiation of a draft drawn by a beneficiary of a letter of credit on a bank that advises the letter of credit is with or without recourse on the beneficiary was resolved by establishing the custom of the majority of Buenos Aires banks. It should be noted, however, that the courts' reliance on custom was in large measure prompted by Article 738 of the commercial code in force, which expressly directed courts to the "commercial usages" when the question involved essential requirements of the bill of exchange or its presentation, acceptance, payment, protest and notification. And even though the matter was not of an essential formal requirement the legislative intention on an area related to the problem at hand was quite clear. In Costa Rican law, see *Halabi Mirage v. Pacific Refrigeration*, Sala de Casación, 22 de diciembre 1958, reprinted in 2 KOZOLCHYK & TORREALBA, *supra* note 23, at 108, (where the question whether a stated price per dozen of merchandise was the product of a typographical mistake was resolved by establishing, *inter alia*, the current price among comparable traders). As stated by this author elsewhere, the applicability of custom or usage in Latin American law depends in large measure on the legislative authorization (usually expressed in the civil or commercial codes) of the applicability of customary law. B. KOZOLCHYK, *COMMERCIAL LETTERS OF CREDITS IN THE AMERICAS* 47 (1966).

B. Mexican Contract Law Adjudication

1. Simulation, Course of Dealing and Usage of Trade

Simulation is the statement of an intent in a deed or document only for official purposes, masking the true, secret or unexpressed intent of the parties. Simulation is not an uncommon occurrence in Mexican commercial practice, especially when the transaction bears a significant tax,⁸¹ as does for example, the sale or encumbrance of real property. In these transactions, the price of the conveyed land is frequently lowered in the public deed or official legal document, or the transaction itself is disguised in a manner calculated to avoid or reduce considerably the tax due. Such practices involve the danger of one of the participants attempting to take advantage of the stated or ostensible intent at the other's expense, particularly when courts read the deeds or documents in a strict or literal fashion. This danger is illustrated in the 1958 *Fernando Lopez* decision by the Supreme Court of Mexico.⁸²

The plaintiff agreed to sell land to the defendant using a private document which stated that the price of the land was 100 pesos. Despite the fact that market price of the land was appraised by an expert witness to be 8,000 pesos, defendant insisted on paying only the stated price. Plaintiff offered evidence to prove that the stated price was inserted merely to accommodate defendant's attempt to avoid payment of real estate transfer taxes. In his answer, the defendant pointed to language in the deed which states that the parties agreed that the stated price was fair and lawful, and that even if in the opinion of experts the price was found to be higher than stated, it was the parties' intention to mutually donate whatever excess or difference existed between market and contract.⁸³ The lower court judge in the state of Puebla held that plaintiff had failed to prove his action on nullity of the deed of sale when attempting to introduce parol evidence on the falsity of the intent.⁸⁴ Plaintiff appealed to the appellate court in Puebla which confirmed the lower court's decision. On appeal, the Mexican Supreme Court ordered that evidence on the possible nullity of the agreement be considered by the state appellate court.⁸⁵ In com-

81. For a description of simulation in Latin American commercial practices, see Kozolchyk, *Law and the Credit Structure in Latin America* 7 VA. J. INT'L L. 1, 11, 12, 33-35 (1967).

82. *Fernando Lopez*, [1958] 14 *Semanario* 81, translated in Butte, *supra* note 49, at 355-65.

83. Butte, *supra* note 49, at 357. The Mexican practice of waiving any claim of lesion by a formal recital in the deed has roots in medieval practices, equally intent on simulation but directed mainly against the church's usury prohibition. Dawson, *supra* note 44, at 374-75, reports that:

Contracting parties attempted to evade the effect of rules as to *laesio* by formal clauses of renunciation, by the use of the oath and by recitals that any discrepancy between the values exchanged represented an outright gift. These attempts encountered vigorous resistance from legal writers and courts with the effect that they were rendered largely ineffective.

See also CODE CIVIL art. 1674 (Fr. 1804).

84. Butte, *supra* note 49, at 357-58.

85. *Id.*

pliance with this decision the state appellate court rendered a new decision in which it found no reason to reverse the lower court's decision. It held that the parol evidence submitted by plaintiff's witnesses to the effect that the value of the land was 8,000 pesos showed at best what the property was worth in the market and not what the parties had agreed upon as the price of the sale.⁸⁶ The Supreme Court of Mexico found that "it having also been proved that the land which was sold is worth 8,000 pesos, it would be a juridical inequity to validate the simulated price of 100 pesos. This price was found to be null because there was not true consent on it."⁸⁷ Furthermore, it found that the agreed upon or true price was 4,500 pesos. Nevertheless, because the price of the land was high enough to require the execution of a public deed and since such a deed was not executed, the court felt that it was unable to implement such an intent and instead decreed the transaction a nullity.⁸⁸ In support of its reasoning the Supreme Court quoted a passage in a textbook written by one of the justices which advocates the rule that once

"the secret act" has been uncovered by a third party or by one of the contracting parties the "ostensible" act is left without legal effect. It also empowers any of the parties to uncover the secret act whenever "the other party tries to take advantage of the ostensible act".⁸⁹

Unanswered by this passage is the problem raised by a party taking advantage of the simulation, *i.e.*, uncovering it once it is found to be unprofitable to continue to perform the contract in accordance with the "secret," "true" or "marketable" intent.

But even when the Mexican courts attempt to effectuate the "true" or "marketable" intent, they are faced with the problem of what to do with the ostensibly valid document. Should this document be invalidated totally or partially? If so, should it be on the basis of the testimony by parties or by witnesses brought by parties whose word the courts distrust in part, at least, as a result of the simulated behavior?⁹⁰ This problem is brought to light in the

86. *Id.* at 359.

87. *Id.* at 361.

88. *Id.* at 363.

89. *Id.* at 365.

90. Mexican procedural law textbooks invariably start the discussion on testimonial evidence by pointing out that:

From Roman law times, the principle prevails that no one can be a witness in his own case (*nemo debet esse testis in propria causa*). The reason is that if the party testifies he can only do it in his own favor or against his own interest. In the former case it would be confessing to the other party's claim, in the latter case the testimony would be redundant and useless.

J. BECERRA BAUTISTA, *EL PROCESO CIVIL EN MEXICO* III, at 112 (Porrua 4th ed. 1974); *see also* E. PALLARES, *DERECHO PROCESAL CIVIL* 372, 373 (Porrua 5th ed. 1974) (where he takes issue with the suggestion by F. Carnelutti, an Italian authority, that the confession by a party should be regarded as a form of testimony). These Mexican attitudes toward the weight and credibility of

1954 Supreme Court decision, *Gonzalez Varela Bernardo*.⁹¹ The parties executed a private document in which defendant-buyer appeared to have paid plaintiff-seller 50,000 pesos of the purchase price of land and agreed to pay an additional 36,000 pesos. In addition, the parties executed a public deed in which defendant acknowledged receipt of 36,000 pesos from plaintiff and agreed to execute a mortgage for this amount using as security land said to have been acquired from plaintiff. In response to plaintiff's plea for a decree of specific performance ordering the execution of the mortgage, an intermediate appellate court stated:

Defendants offered as evidence in their behalf the testimony of the witness A.G. . . . who testified that G.V. had said, and the witness heard, that the 36,000 pesos to which the mortgage deed refers were the same ones which the defendant still owed to the plaintiff, as a result of the purchase of the lots. . . . This oral testimony, in spite of the fact that it was made by only one witness lead this court to the conviction that in fact, the 36,000 pesos that the plaintiff now claims from the defendants, were not given to them in cash, but, in order to guarantee payment of the 36,000 pesos, which they still owed the plaintiff as a result of the purchase and sale transaction . . . the plaintiff required a mortgage from them, and for this purpose the parties simulated a loan with interest and mortgage guarantee. The function of the courts is not to give effect to simulated acts, even though they may fulfill certain requirements of a formal character; on the contrary, . . . it is to bring light to the facts and impart justice. It would be from every point of view unjust for this court to order JPA and MIG to pay 36,000 pesos on the supposed loan agreement with interest and accompanying mortgage, because if this were ordered, there would still be outstanding the right of the said G.V. to require JPA and his wife to pay another 36,000 pesos. That is to say those which the defendants say was still owing to G.V. as a result of the sale. . . .⁹²

parties' testimony are shared widely throughout Latin America. Typically, Argentine courts have held: "The statements of parties answering interrogatories are not evidence in their favor . . . they are a simple reaffirmation of their pleadings. They neither change the terms of the *litis*, nor do they afford these terms any greater credibility." *Iriberry v. Lasalle*, Camara 1^{era} Ap. Mar del Plata, 16 de julio de 1964, [1965] 117 La Ley 821, involving a simulated sale transaction. See also, on how an allegation or statement of fact by a party cannot benefit but can harm the party's position, *Varsky v. Flomenbaum*, Camara Nacional Civil Sala E., 3 de octubre de 1966, [1967] 125 La Ley 585, also involving an allegedly simulated transaction. But cf. 1 D. ECHANDIA, *TEORIA GENERAL DE LA PRUEBA JUDICIAL* 23 *et seq.* (Argen. 1974) advocating, as does Carnelutti, that greater weight be given to parties' testimony. Noteworthy (although neither articulated nor warranted) assumptions by the traditionalists are: 1) that parties necessarily will testify to that which is in their interest; 2) that such testimony is bound to be inconsistent *inter se* and with the truth and; 3) that it will be no value in establishing facts even where the parties' interest is not in conflict.

91. *Gonzales Varela Bernado*, [1955] 125-II Semanario 1573, translated in Butte, *supra* note 49, at 341-45.

92. Butte, *supra* note 49, at 343.

Significantly, the intermediate appellate court assumed that although plaintiff had not yet claimed any more than the parties had truly agreed to, there was a serious likelihood that if such an intention was implemented, the plaintiff would unjustly enrich himself in the future by claiming the same sum using the private document as evidence.⁹³ However, by adopting this attitude, the court was depriving the plaintiff of the agreed upon and marketplace value. The Supreme Court reversed this decision but in doing so its reasoning was, paradoxically, based upon strict law considerations:

The hearsay testimony of one witness can be given no significant weight in this case. . . . The court below gives extraordinary weight to this evidence in disregard of the old principle "*Unus testis, nullus testis*", and as the other considerations by the court below are supported only by suppositions [it] is evident that its reasoning is inadequate. . . . It should be observed moreover that (the lower court reasoning) in no way corresponds to the need to decide civil controversies such as this amparo in accordance with strict law."⁹⁴

The court added that:

It is pertinent to observe of course, that there is no legal nor material incompatibility between the one and the other transaction (the sale and the loan) and since the defendants are both competent to contract and as from the deed itself it appears that at the moment of making the agreement they were in full command of their mental faculties and executed the contract with their free consent. . . . It is neither logical nor legal that on the basis of such fragile presumptions they should attempt now to deny the validity and efficacy of the obligations undertaken by them, especially if these obligations were stipulated in solemn form under the certificate of the notary public and with all the requisites provided by law.⁹⁵

The strong reluctance to examine contractual intent in the light of market considerations is apparent also with regard to course of dealing. In a case involving the question of whether, in the absence of a contractual stipulation on the place of payment and default, plaintiff was entitled to rely on the fact that defendant's preceding 43 installment payments were made at plaintiff's domicile,⁹⁶ the Supreme Court of Mexico stated:

Although it is true that the purchaser admitted that he had the obligation to make payments at the vendor's house, and that it was there that he delivered the 43 payments which he made, . . . it is also true that his admission and his past conduct do not have the

93. *Id.*

94. *Id.*

95. *Id.* at 344.

96. Ana Maria Navarrete Carapia, [1964] 85 *Semanario* 30, translated in Butte, *supra* note 49, at 313, 317.

evidentiary force that the plaintiff wishes to attribute to them. The admission cannot be upheld because it is contradicted by the terms of the contract where nothing is said or promised with respect to the admission. The only conclusion to be drawn from such an admission then is that the party making it erroneously believed that he had to take the payments to his creditor, and not that the creditor had to come to him to collect them.⁹⁷

The weight attributed to contractual silence by the Supreme Court of Mexico is especially noteworthy. Even though silent on the place the parties wished to designate as the place of payment and default, contractual silence was deemed to negate the parties' reiterated conduct.

2. Equity

Predictably, the Mexican courts' unwillingness to allow contractual intent to be determined by course of dealing and usage of trade is linked with a reluctance to adjudicate contractual disputes in accordance with what United States courts usually describe as equitable principles. Two Mexican Supreme Court decisions illustrate this point.

In the 1941 decision of *Suc. de Viteri Jorge*⁹⁸ it appeared that Mr. Viteri, an engineer, entered into an agreement with the owner of an oil well, in which Mr. Viteri undertook to make an unproductive well productive. In addition, Mr. Viteri agreed to manage and supervise production once the well was made productive and for as long as it continued to be profitable. In exchange for such an obligation Mr. Viteri was to receive fifty percent of the profits yielded by his efforts. The lower court found that Mr. Viteri's efforts had been successful, and that for a period of time prior to his death Mr. Viteri managed the well operations. Upon his death, his estate claimed the right to continue to receive fifty percent of the well profits. The Supreme Court as well as the lower courts refused to allow his claim. The courts' reasoning is particularly revealing.

The lower courts based their decisions on the characterization of the contract as an agreement to enter into a joint venture (*asociación en participación*) as opposed to a contract for the performance of service on a lump sum payment basis.⁹⁹ The intermediate appellate court acknowledged the harshness of depriving the plaintiff's estate of the fifty percent profit upon Viteri's death, especially since the evidence of plaintiff's contribution to the profitability of the well stood unchallenged. Nevertheless, since the agreement constituted a joint venture association, and this association was not dissolved in accordance

97. Butte, *supra* note 49, at 316.

98. *Suc. de Viteri Jorge*, [1955] 125 *Semanario* 315, translated in Butte, *supra* note 49, at 309-12.

99. *Id.* at 309-10.

with dissolution requirements of the law of business associations, the court stated that it was powerless to adjudicate the claim to the share as requested by Viteri's estate.¹⁰⁰ The Supreme Court characterized Viteri's obligations as "personal" in nature and thus the right to fifty percent of the profits was limited to the production of oil for as long a time as Viteri, by his personal work, made profitability possible.¹⁰¹ Upon his death, the Supreme Court reasoned, the other party to the contract could terminate the agreement and cancel its obligations thereunder.¹⁰² In response to appellant's contention that Viteri's work could not be categorized really as "personal" as it could have been done by another person having Viteri's skills, the Supreme Court stated: "The important consideration is not that the technical work can be replaced but that, since the work agreed upon is strictly personal, if he can no longer perform it, the other party has the right to rescind the contract."¹⁰³ The estate was deprived of the right to fifty percent of the profits.

In response to appellant's claim that defendants would be unjustifiably enriched by the lower court's holding, the Supreme Court admitted the possibility that Viteri's bringing the well into production was of great economic significance. The Court also stated that, in comparison with the subsequent work of management, supervision and maintenance, each of these activities might deserve a twenty-five percent share of the surplus oil production. Yet, because the appellants did not apportion the value of the claims, the Supreme Court said it was powerless to apportion them on their behalf.¹⁰⁴ Accordingly the appeal was denied and with it the claim to Mr. Viteri's fifty percent of the profits.

The Supreme Court's reliance on the characterization of the contract as "strictly personal" is not without serious conceptual difficulties. Aside from the fact pointed out by the appellant, that a substitute performance was indeed possible, the court assumed that the rights earned by a strictly personal performance were neither assignable nor inheritable. This assumption ignored the distinction between the right to perform in a "strictly personal" contract and the rights earned after complete or significant part performance of a contract. The absurdity of such a reasoning is highlighted by the hypothetical situation in which Mr. Viteri had been paid part of his share of production just after completing the work of making the well profitable. Would his estate not have been entitled to such a share? If his estate could have inherited proceeds, why could it not inherit rights to proceeds earned by performance? The Supreme Court of Mexico chose to rely on the classification of an obligation as

100. *Id.* at 310.

101. *Id.* at 311.

102. *Id.*

103. *Id.*

104. *Id.* at 312.

"strictly personal" and its asserted sequel of untransferability (however inconsistent the application of such a definition was in the different contexts of a right to perform and a right to inherit proceeds earned by performance) rather than on the benefits unjustly appropriated by the defendants. This attitude is consistent with that shown in other decisions where equity would have required that contracts be adjudicated by evaluating the mutuality of the parties' bargain in light of the market value of the respective performances, but the Court chose the literal tenor of contractual stipulations.

In the 1932 Mexican Supreme Court decision *Karras v. Friedenberg S.A.*,¹⁰⁵ plaintiff, as an endorsee, holder in due course of three bills of exchange accepted (but unpaid) by defendant, claimed payment of 1357 U.S. dollars or its equivalent in Mexican pesos. The lower court judge ordered payment of 3,420 Mexican pesos and, when payment was refused, decreed execution of judgment against defendant's property.¹⁰⁶ Both parties appealed the execution decree. Plaintiff asserted that the amount of Mexican pesos set forth in the decree corresponded, not to the rate of exchange at the time of the decreed payment by the court, but to the rate in effect at the time of the filing of the complaint. There was a significant difference between these two amounts as a result of monetary devaluation. He contended that the lower court's decision was contrary both to Mexico's monetary law and to the principles of equity.

Article 509 of the Mexican Commercial Code in force at that time provided that if the foreign currency stipulated in the bill of exchange was not legal tender, the payment would be in a sum equivalent to that stipulated on the basis of the rate of exchange in effect on the instrument's "due date" (*dia del vencimiento*).¹⁰⁷ However, Article 8 of the subsequently enacted monetary law provided that the rate of exchange for the determination of the amount due was that in effect on the date of payment (*pago*).¹⁰⁸ The Supreme Court chose to read the term payment as if it meant the due date of the bill of exchange and not the date of actual payment.¹⁰⁹ Assertedly, this interpretation avoided any possible conflict between the above mentioned provisions. In reply to plaintiff's contention that defendant was unjustly enriched by such an interpretation, the court stated that "the rise or fall of rates of exchange and their effects upon payment is an economic phenomenon which is independent of the legal necessity to fix, as of the initiation of lawsuits, the quantum of the claim."¹¹⁰ In addition, the court addressed itself to the role of equitable principles in its adjudication as follows:

105. Gerhard Karras y Cia v. Friedenberg S.A., [1934] 5 Revista General de Derecho y Jurisprudencia 116.

106. *Id.* at 117.

107. *Id.* at 119.

108. *Id.*

109. *Id.*

110. *Id.* at 120.

The appellant invokes equity in order to obtain a higher recovery, without taking into account that a court of law as this court is, except in those cases where the law authorizes resort to equitable principles to resolve concrete cases, cannot apply such principles because it would violate equality before the law which is the basis of social order. As long as there are legal provisions applicable to the case in question there is no reason to attempt to correct them, thereby substituting the legislative by another, entirely subjective will. . . .¹¹¹

In his insightful commentary on this decision, Professor Garcia Maynez pointed out that statutory law in force at the time this decision was rendered directed the courts to decide controversies involving equal rights or rights of the same legal species by "observing the greatest possible equality between the parties," or on the basis of "the maximum amount of reciprocity."¹¹² Accordingly, even though equity could not in Professor Garcia Maynez' opinion correct statutory law, it definitely had a supplementary role, especially where statutory law was unclear.¹¹³

But there is more to this decision than a mistaken assumption of the supplementary role of equity, or an excessively formalistic view of pleading (a view that would rather countenance unjust enrichment than allow an amended complaint reflecting the larger sum claimed). The court perceived the market value of the performances involved as "an economic phenomenon" which was "independent" of legal consideration.¹¹⁴ Thus, law was perceived as concerned with facts devoid of economic or marketplace implications. Contrary to conventional wisdom,¹¹⁵ equity, in turn, was perceived as bringing about inequality before the law, because equitable decision-making was assumed to be perforce, highly subjective or arbitrary.

111. *Id.*

112. *Id.* at 127.

113. *Id.*

114. *Id.* at 120; see text accompanying note 110 *supra*.

115. The conventional wisdom referred to in the principal text is that expressed by Aristotle in Book V of the *Nicomachean Ethics*:

When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over simplicity, to correct the omission to say what the legislator himself would have said had he been present, and would have put into his law if he had known. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.

ARISTOTLE, *THE NICOMACHEAN ETHICS*, translated in 11 *THE OXFORD TRANSLATION OF ARISTOTLE* (W. D. Ross, ed. 1925), reprinted in G. CHRISTIE, *JURISPRUDENCE, TEXT AND READINGS* 70-71 (1973). The Mexican Supreme Court's version of equality therefore is predicated on the assumption that all statements by the law are not only universal (to use Aristotle's term) but also invariably, all encompassing in nature. For only such all encompassing statutes (*i.e.*, those who treat equals as equals and unequals and unequals) could validly claim equality of treatment.

C. *Equity in Contractual Adjudications of other Latin American Countries*

The previously described attitude is not peculiar to Mexico's Supreme Court. A 1971 study of Chilean decisions by Professor Gesche Müller on the effect of monetary devaluation on contractual obligations concludes that:

despite the acute monetary devaluation of almost half a century, Chilean case law and doctrine has inflexibly applied the nominalistic doctrine. . . . This has led to a distortion of the concept of equity in the Civil Code, in areas such as . . . payment of dividends by civil and commercial companies, restitution, rescission or nullity of contracts, specific performance of promises in bilateral contracts where one party promised money and the other identifiable goods or property, installment payments over a long period of time, etc.¹¹⁶

Similarly, Professor Rosenn's recent study on inflation in Latin American law points out that

Unlike American, Austrian, French, German and Polish legislatures, which enacted general legislation revalorizing specific categories of obligations expressed in badly depreciated currency, Latin American legislatures have mandated revalorization only in a very limited number of circumstances. Such exceptional legislation generally has been aimed at protecting the government's own patrimony or the smooth operation of government services rather than bailing out improvident contractors.¹¹⁷

In addition, Rosenn points out that despite the legislative enactment in Argentina of the "*imprevisión*"¹¹⁸ doctrine as a ground for annulling or revising a

116. B. GESCHE MÜLLER, JURISPRUDENCIA DINAMICA Y LA DESVALORIZACION MONETARIA Y OTROS PROBLEMAS DEL DERECHO 18 (Chile 1971) [hereinafter cited as GESCHE MÜLLER].

117. Rosenn, *The Effects of Inflation on the Law of Obligations in Latin America*, 2 B.C. INT'L & COMP. L. REV. 269, 278 (1979) [hereinafter cited as Rosenn].

118. Professor Rosenn, *id.*, traces the origins of the *imprevisión* doctrine to the medieval doctrine of *rebus sic stantibus*, which:

posits that every contract contains a tacit clause (or implicit conditions subsequent) ending or modifying its obligatory force whenever there has been such a substantial change in the state of facts prevailing at the date of the contract was made as to render its performance unjust. . . .

There is no single definition of the theory of *imprevisión*, but its core concept is that a court may annul or revise a contract whenever there has been a substantial and unforeseen change in the economic conditions prevailing at the time the contract was made, rendering performance by the obligor exceedingly onerous, though not objectively impossible.

Id. at 279, 280 (citation omitted). A 1968 amendment of Article 1198 of the Argentine Civil Code provided that: "If in contracts with deferred or continued performance, the performance of one of the parties becomes excessively onerous because of extraordinary and unforeseeable events, the prejudiced party may demand the termination of the contract. . . ." CÓDIGO CIVIL art. 1198 (Argen.). On this amendment see Rosenn, *supra* note 117, at 281.

contract whenever there is an unforeseen substantial change in the economic conditions prevailing at the time of entering into the agreement, Argentine courts until quite recently have been reluctant to relieve contractual parties. They have asserted that inflation is too notorious a fact of life in Argentina to be ignored by the parties.¹¹⁹

As with the Mexican Supreme Court's use of strict pleading to disqualify the claim to an amount of pesos equivalent to the dollars specified in the text of a bill of exchange, Argentina's National Appellate Commercial Court refused as late as December 1977, to revalue claims embodied in negotiable instruments because this would have required that the courts disregard the "independent" nature of the promise in the negotiable instrument and "delve into underlying contractual considerations. . . ." ¹²⁰ Formalism and strict pleading were equally apparent in the Chilean Supreme Court's refusal to revalue damages and death benefits awards by courts of first instance by asserting that such a revaluation would have inflicted serious harm on the principle of *res judicata*.¹²¹

The reluctance of Argentina and Chilean courts to adopt a "valoristic" or equivalent value approach to the discharge of monetary obligations cannot be attributed solely or even preponderantly to the legislative adoption of a nominalistic principle of adjudication. Court decisions in these countries, until recently, have provided every indication that the nominalistic approach is so highly compatible with the judicial sense of fairness that it is applied even where the facts involved do not require or warrant its application. For example, in *Bustillo v. Cafe Paulista S.R.L.*,¹²² a 1953 decision by the Supreme Court of Argentina, the issue was not one of monetary equivalence but whether the parties to a long term lease could have validly agreed that in the event of a forty percent devaluation of Argentina's currency the amount due would be determined by an agreed upon arbitration procedure. In rejecting the validity of such a clause the Supreme Court equated the parties' stipulation to an usurpation of a public law function. This was presumably the State's power to impose a nominal value regardless of the parties' choice of a market value.¹²³ It held that the determination in question was strictly legal in nature and

119. See *id.* at 282 and also note this author's finding that "Spurred by the hyperinflation of 1975 and 1976 and a strong doctrinal current, the Argentine courts have recently jettisoned nominalism on their own and permitted recovery for monetary depreciation where there has been delay in payment of pecuniary obligations." *Id.* at 295 (citations omitted).

120. Judgment of April 13, 1977, Camara Nacional de lo Commercial, en pleno, [1977] 42 La Ley 1, 2 ¶ 5.

121. See Berta Guzman de Shirazawa v. Empresa de Ferrocarriles del Estado, 10 de septiembre de 1942, [1963] 60 Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales 407, extracted and reprinted in GESCHE MÜLLER, *supra* note 116, at 57-69.

122. [1953] III JURISPRUDENCIA ARGENTINA 89.

123. *Id.* at 93-94.

therefore not within the competence of arbitrators who only should concern themselves with non-legal or "technical" matters.¹²⁴ On its face, this reasoning would seem contrary to that of Mexico's Supreme Court in the *Karras* decision where it was held that monetary devaluation was an economic fact with which the law was unconcerned.¹²⁵ At root, however, the contradiction is only apparent since both courts are equally jealous of their prerogative to decide what each perceives as a legal issue in the same nominalistic fashion. Both courts reject "non-legal" or market inspired considerations whether under the guise of economics, arbitration, or equity.

D. *Third Party Rights in Latin America*

In contrast with Anglo-American principles of adjudication which predicate in large measure the rights of third parties such as holders of negotiable instruments, purchasers of personal or real property and secured creditors on the giving of value and on the purpose of such a giving, value does not play a major role in the adjudication of some of the most economically significant third party rights in Latin American law. A 1964 decision by the Supreme Court of Colombia is particularly illustrative because the statutory law in force at that time in Colombia was a Spanish translation of the United States Uniform Negotiable Instruments Act,¹²⁶ a law in which value played a key role in determining the rights of holders in due course.¹²⁷ In *Cia Bogotana de Teatros S.A., v. Ramirez*,¹²⁸ appellant alleged, *inter alia*, that defendant appellee was not a holder in due course (*tenedor en debida forma*) of appellant's check because he had admitted in answers to interrogatories that he had not paid value for the checks in his possession.¹²⁹ It also appeared in the record that the checks' payees had denied having endorsed them to appellee.¹³⁰ Appellant alleged that the lower court erred in dismissing his complaint by asserting that not all the elements of an unjust enrichment action had been listed and that even if all the elements of an unjust enrichment action had not been listed, his actions should have been treated as an action on restitution for monies wrongly paid or collected.¹³¹

After establishing that the action for restitution of monies wrongly paid or collected was a species of the unjust enrichment genus and that it would fail if

124. *Id.* at 89 ¶ 5.

125. See text accompanying note 110 *supra*.

126. Ley de Instrumentos Negociables, 46 de 1923 (Colom.); see comment on its translation from the negotiable instruments law and adoption in E. JARAMILLO SCHLOSS, LOS INSTRUMENTOS NEGOCIABLES EN EL NUEVO CÓDIGO DE COMERCIO 66, 67 (Bogota 1974); R. RENGIFO, LA LETRA DE CAMBIO Y EL CHEQUE 133-35 (Colombia 1977).

127. See note 73 *supra*.

128. Suprema Corte, [1964] 107 Gaceta Judicial 58.

129. *Id.* at 62.

130. *Id.*

131. *Id.*

all the generic elements were not present,¹³² the Colombian court concluded that the negotiable instruments law in force presumed the genuineness of signatures and endorsements.¹³³ Accordingly, an allegation of falsity of an endorsement required proof of the actual forgery. Moreover, the law was said to presume that when the instrument was in the hands of a holder in due course it had been validly transferred by his predecessors. In passing, it referred to the negotiable instruments law section on holding in due course and to the section which establishes the rebuttable presumption that a holding, unless proven otherwise, is in due course. Based on these sections, the court held that when the lower court required proof of the actual forgery (as contrasted with the endorser's denial of the genuineness of their endorsement), it acted consistently with the law's policy to protect holders in due course.¹³⁴ It further agreed with the lower court's finding as to the impropriety of an unjust enrichment claim and rejected the appeal. Conspicuously absent was a discussion of the effect that appellee's failure to provide value had on his asserted status of holder in due course.¹³⁵

Of equal economic significance to the determination of the status of a holder in due course in terms consistent with market practices, is the determination of who is entitled to the status of a protected third party purchaser of personal or real property, or of a secured creditor. In the field of personal property transactions, market practices have made it clear that the same goods must be used as security or "collateral" by different parties simultaneously, albeit legitimately, in order to finance various stages of the transaction and of the distribution of goods process. When the same goods serve as security for the seller and his financiers, the buyer and his financiers, and when possession of the goods is with a third party such as a carrier or warehouseman during certain stages of the transaction and during another stage with the ultimate consumer, the relevant market question is not who is the ultimate owner among the various legitimate claimants, but who among them has the worthiest claim to immediate possession. For whatever rights the first owner had prior to the goods' ingress into the channels of trade, the financing of each subsequent participant in market transactions has required the fragmentation of such a right. Some rights are retained by the seller or his financier; some are incorporated into the document acknowledging receipt for transportation or warehousing; some are acquired by the merchant who buys the goods in order to resell them; some are acquired by his financier; and some are acquired by the consumer and his financier.

132. *Id.* at 65-66.

133. *Id.* at 66.

134. *Id.*

135. *Id.*

To attempt to resolve questions affecting the rights to possession by determining first who is the owner or by modeling the determination of possession after the determination of ownership can be irrelevant and quite costly. For example, S. J. Rotman, an Argentine authority on chattel mortgage and especially motor vehicle financing law, found in a 1967 study that "the very grave losses suffered by the Argentine motor vehicle trade"¹³⁶ (in the period studied) were attributable to an administrative and judicial confusion between the requirements of titling motor vehicles and providing notice of secured transactions using these vehicles as collateral. This confusion resulted in the Chattel Mortgage Registry's denial to issue chattel mortgage certificates until the titling procedure had been satisfied and vice versa.¹³⁷ Very soon, according to this author, "hundreds of millions of pesos of chattel mortgage financing lay immobile awaiting action in the Chattel Mortgage Registry."¹³⁸

The attempt to treat a secured transaction's recording as if it required a recordation of title to the chattel was responsible for the following not uncommon situation observed by the author in Costa Rica in 1968: "C," a secured creditor, brought his security agreement for recordation to the Registry of Pledges on the day 1. "P," a good faith purchaser of the chattel, on day 15, searched the records and found no reference to the recording of C's security interest. Therefore, he bought the chattel. Despite the absence of recordation of C's interest, C would still prevail over P under Costa Rican Law as a result of Article 542 of the Costa Rican Commercial Code which established the date of "presentation" of the security agreement to the registry as the date at which third party rights were affected. The reason for the absence of a recordation or notation in the Debtor's Index of the Registry as of the date of presentation was that filings were treated by registry administrative rulings as if they were recordings of title. It was not until the agreement had been assigned for recording to the responsible clerk was there a reference to the presentation of the security agreement entered in the index.¹³⁹ Therefore, controversies regarding the perfection of the security interest or the priorities among secured creditors could not be resolved by the notion of reliance on what appeared on record.

Similar difficulties with reliance on registry notice are apparent in Mexican land registry law, especially as a result of recent decisions by the Mexican Supreme Court on what constitutes good faith in the purchase of real property. Presently, good faith requires that the third party engage in a very diligent if not exhaustive search of his chain of title, a highly difficult and complex task even for specialists.¹⁴⁰ Moreover, even after the most thorough

136. S. JULIO ROTMAN, *LA BUENA FE EN LA PRENDA CON REGISTRO* 37 (Buenos Aires 1967).

137. *Id.*

138. *Id.*

139. 3 KOZOLCHYK & TORREALBA, *supra* note 23, at 32, 33-36.

140. *See, e.g.*, Eufasia Rodriguez de Ibarra, *Suprema Corte de Justicia*, [1966] 105 *Semanario*

search, the purported third party would have to contend with a judicial doctrine which in effect requires him to be well versed in real property law. Since "ignorance of the law cannot benefit a third party . . ." ¹⁴¹ reliance on a recording which resulted from a court decision that was subsequently reversed could prove fatal to the rights of third party purchasers or creditors under Mexican decisional law.

VII. COMPARISON OF UNITED STATES AND LATIN AMERICAN VERSIONS OF (F2)

The reliance on the market as the preeminent standard for adjudication of commercial controversies increases the predictability of the outcome of disputes. To a layman, terms such as "reasonable," "seasonable" or "merchantable" may sound vague and unpredictable. To the student of Anglo-American judicial decisions and commercial statutory law as well as to experienced merchants, these terms have a concrete market connotation and a commercial reality reference.

At its most basic level, the market standard requires that in every contract or transaction there be what the California Supreme Court described as "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." ¹⁴² To the extent that courts' perceptions of intended benefits coincide with trade usage and custom, regular market participants are able to predict better the outcome of their controversies. As stated by a federal court in a landmark 1967 decision, "good business practices should make good business law." ¹⁴³

Still, uncertainty arises in three situations. The first is where the nature of the benefits sought by each party is unclear and the courts cannot, by relying on usage of trade or custom, determine whether a party is in effect getting something for nothing. ¹⁴⁴ If the court is unable to characterize the transaction

51, translated in Kozolchyk, *The Mexican Land Registry*, 12 ARIZ. L. REV. 308, 353, 355 (1970) [hereinafter cited as Kozolchyk], where the Court concluded:

To avoid a presumption of irregularity (*ligereza*) or bad faith in the acquisition of immovable property, a party seeking the protection of the registry must be able to prove that he had exhaustively searched his chain of title. . . . Ignorance of the law is not an excuse for non compliance with this obligation.

141. [1966] 105 *Semanario* at 95; see discussion thereof in Kozolchyk, *supra* note 140, at 337-38.

142. *Brown v. Superior Court*, 34 Cal.2d 559, 564, 212 P.2d 878, 881 (1949).

143. *In re Portland Newspaper Publishing Co., Inc.*, 271 F. Supp. 395, 400 (D. Ore. 1967).

144. Assume for example that some bank customers engage in the practice of asking their banks to issue letters of credit payable on the presentation not of original documents, as is usual, but of duplicates thereof. No documents are presented by beneficiaries of the credits to the bank and therefore no legal basis would seem to exist for a court to decide that the bank is entitled to a commission for the customers' and beneficiaries' use of the credit. Yet a denial of the right to commission for the mere issuance of the credit would ignore the benefit conferred upon parties who

as, say, a loan, a sale or a commission agency it would be pointless to ask sellers, borrowers or commission agents what most of them would do under the circumstances. The second and more common situation is where there are conflicting versions of the meaning, validity or efficacy of contractual terms, conditions or of custom and usage, as a result of the parties' membership in trade or professional groups which have opposing interests. For example, banks that handle the verification of documentary compliance in letter of credit transactions have views which conflict with those of insurance brokers in the business of issuing certain insurance documents. Accordingly, each group would have testified differently on the question whether an insurance "certificate" or "cover note" should be acceptable for a credit that calls for an insurance "policy."¹⁴⁵ Similarly, depending upon the side of the transaction on which the regular market participant finds himself, he may invoke contradictory customary or usage of trade definitions for a "clean" or "stale" bill of lading, or even for "chicken." In such cases courts find it necessary to interject their own notions of what constitutes a fair benefit by assuming, as did Judge Friendly in *Frigaliment Importing Co.* that the parties' intent was that there should be a profit especially when each party is deemed to be acting with a view to his own advantage.¹⁴⁶

It should be emphasized that even where, as in *Frigaliment*, "good faith" and "fair dealing" are used, they are not used interchangeably; good faith still requires that the court ascertain the true intent of the parties in light of what most participants in a similar transaction would have intended, regardless of formalistic considerations. In other words, it would have been most unusual for a court in the United States to disregard the testimony of a reliable witness as to what the parties intended simply because the contract was embodied in a public deed, as was done by Mexico's Supreme Court and state appellate courts as well as by other Latin American state appellate courts.¹⁴⁷ The contrasting attitude is strikingly illustrated by Louisiana court decisions on the "full proof" value and reformation of "authentic acts," Louisiana's counterpart to Mexico's and Latin America's public deeds.¹⁴⁸ In 1958, the Supreme Court of Louisiana in *Wilson v. Levy*,¹⁴⁹ held that a party to

agree that if payment is not made against presentation of original documents the bank's payment against duplicates can be counted on. For a discussion of this practice see B. KOZOLCHYK, *COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS* 116-17 (1966).

145. *Id.* at 428-29.

146. See text accompanying note 68 *supra*.

147. See text accompanying notes 82-89 *supra*. For an example of a similarly sounding Colombian Supreme Court decision, see [1964] 108 *Gaceta Judicial* 143, in which the Court stated: "The document executed before a Notary Public is literal proof *par excellence* and constitutes the solemn and indispensable requisite for the formation of a contract of sale of immovable property in accordance with the law. . . ."

148. See generally 1 S. LITVINOFF, *OBLIGATIONS* 203-04 (1969).

149. 234 La. 721, 101 So.2d 214 (1958).

a conveyance in an "authentic act" in which, by mistake or inadvertence, thirty more acres were included than the parties had intended, can reform the authentic act by proving the true intent of the parties.¹⁵⁰ Significantly, after hearing the parties' testimony, the lower court heard Ellis J. Smith, the real estate agent involved in the transaction, whom the court described as "one thoroughly familiar with the property of the vicinity."¹⁵¹ Thus, even in a jurisdiction such as Louisiana, where courts are directed by statute to give "full proof" value to authentic acts, the established decisional law rule is not one of "strict law" but one in which "Either party is always permitted, in a suit between the parties to the contract, to correct any error in the instrument purporting to evidence the contract, so as to make it express truly and correctly the intention of the parties. . . ."¹⁵²

The Latin American decisions reviewed indicate that the attempt to construe contractual intent do not, as a rule, rely on (F2) especially when the contract or promise is embodied in a public deed. While the Supreme Court of Mexico in *Fernando Lopez*¹⁵³ reversed Puebla's appellate court's decision and considered parol evidence on the true value of land conveyed through a private deed, in *Gonzalez Varela*¹⁵⁴ it rejected such evidence when construing public deed stipulations. It could be argued that a strict or literal interpretation of the stipulations in a public deed, even though unfair from an (F2) standpoint, could nonetheless provide a high degree of certainty. This presupposes that the meaning of expressed intention is susceptible to uniform interpretation, regardless of the context in which the terms were used. This is an altogether unwarranted presupposition in any legal transaction regardless of the legal system. As illustrated by *Gonzalez Varela* and *Fernando Lopez*, a term as seemingly unambiguous as the price of a conveyance of land becomes highly uncertain once couched in the context of a tax evasion inspired simulation. Similarly, after reading *Frigaliment*,¹⁵⁵ one can no longer validly assume that "chicken" has the same meaning for a U.S. exporter as it does for a European importer. It is common for Latin American courts to use abstract or "purely logical" concepts or principles of interpretation instead of (F2) when they are unable to rely on the literal meaning of contractual terms or even when attempting to construe such meaning.¹⁵⁶

150. *Id.* at 722, 101 So.2d at 215.

151. *Id.* 723, 101 So.2d at 216.

152. *Id.* at 215.

153. See text accompanying note 82 *supra*.

154. See text accompanying note 91 *supra*.

155. See text accompanying note 68 *supra*.

156. Reliance on "purely logical" concepts is illustrated in a statement attributed by the Argentine [1944] Repertorio La Ley 265 to the Uruguayan Tribunal de Apelación 2° turno, 26 de julio de 1943: "to talk about replacing an express agreement by a tacit one is legal absurdity" (*hablar de la sustitución de un convenio expreso por otro tacito constituye un absurdo jurídico*). Implicit in this

The question of what is fair remuneration for making an oil well productive in a dispute over the meaning of an agreed upon fifty percent production royalty was resolved not by determining the customary methods of compensation in the oil drilling trade but by ascertaining the "strictly personal" nature of the services rendered and those still to be rendered under the contract.¹⁵⁷ It is also worth recalling that the Supreme Court of Mexico itself admitted that a very substantial part of the claim was related to services already rendered,¹⁵⁸ thereby impliedly conceding the irrelevance of the chosen criterion at least with regard to half of the cause of action. Moreover, as illustrated by the Colombian Supreme Court in *Compania Bogotana de Teatros S.A.*,¹⁵⁹ in some instances there is not only an inconsistency between the operative facts and the deciding concept or principle, but also a sharp conflict between what is implicit in the concept or principle as perceived by the court and fundamental market presuppositions. Implicit in the Colombian Supreme Court's ruling that due course holding does not require value is a presupposition totally at odds with the market.

Market participation presupposes a giving of ascertainable value, and an active market is characterized precisely by the encouragement it provides to such a giving through the award of a preferential legal status such as that of the holder in due course. When courts grant the privileged status of a holder in due course to any holder, the giving of value and the market activity are discouraged. This occurs because obligors become vulnerable to unwarranted claims and fewer of them are willing to become makers, drawers, acceptors or endorsers of negotiable instruments. Therefore, such a rule is not merely a source of uncertainty, but is a prime candidate for instant desuetude.

Latin American judicial and administrative reliance on title as the determinant of secured and third party rights in personal property transactions breeds similar uncertainty where the market has made it necessary to fragment title into various valid and often conflicting rights to immediate possession. Not infrequently, judicial reliance on doctrine as a substitute for (F2) results in decisions contrary to the market standard. *Picado Guerrero v. Rojas Diaz*,¹⁶⁰ a 1965 decision of the Costa Rican Supreme Court, exemplifies this tendency. Plaintiff, a highly successful attorney who had just earned a substantial fee, con-

statement is the assumption that once terms have been expressed, regardless of what the true intent of the parties may be or may become, there can be no other intent, not even a superseding one, unless expressed as was the first. Accordingly, the existence of a true intent is subordinated to the form of its expression, as long as there is a writing or other formal expression of such an intent.

157. See text accompanying notes 98-104 *supra*.

158. See text accompanying notes 103-04 *supra*.

159. See notes 128-35 *supra* and accompanying text.

160. *Picado Guerrero v. Rojas Diaz*, 1965, Sala de Casación, reprinted in 2 KOZOLCHYK & TORREALBA, *supra* note 23, at 139.

tracted a well-known local broker and asked him to find a lucrative investment. The broker had been contacted previously by the holder of treasury bonds which offered both an attractive yield and discount. The plaintiff asked the defendant broker to send the bonds to the National Bank for verification of authenticity and when he was informed that they appeared to be authentic he purchased the bonds and paid the broker a commission. Shortly thereafter it was discovered that the bonds were a forgery. The central issue before the Supreme Court of Costa Rica was whether the defendant was a "commission agent" (*comisionista*) or a "broker" (*corredor*).¹⁶¹ If deemed to be a commission agent, he had to assume personal liability for the validity of the bonds. If deemed a broker, he was only an intermediary and was not liable to his purchaser. In determining the defendant's status the Supreme Court said that defendant himself acknowledged his status as commission agent by using such a label in his office and letterhead. It considered evidence in the form of statements by leading Latin American and European commercial lawyers on the question, "Who is a commission agent and what is his liability as compared to that of other intermediaries?"¹⁶² and found defendant liable for plaintiff's losses. Significantly, however, the court attributed no value to the evidentiary finding that in San José, Costa Rica, among merchants as well as non-merchants the label "commission agent is used to designate a simple broker"¹⁶³ and was used as such by the defendant in all his dealings. Thus, a doctrinal definition of commission agency inspired in European usages displaced that which prevailed in the San José market where the transaction took place.

In concluding this comparative evaluation some clarifications are necessary. The first is that the reticence of Latin American courts to rely on (F2) when construing the intent of public deeds or formal contracts is often prompted by the distrust of and little weight given to parties' testimony.¹⁶⁴ Secondly, Latin American courts may well be hampered in their application of (F2) as a result of the peculiar perceptions of what is the market by market participants in Latin America. Paul Karon's recent field study on Mexico City lending practices and perceptions of fair rates on interest¹⁶⁵ found that in response to the question, "What is a fair rate of interest?", most lenders replied that it was the "economic" rate given by supply and demand.¹⁶⁶ In reality however, the demand for credit so far outstripped its supply that there was a truly monopolistic method of determining rates. The rates charged by the

161. *Id.* at 152.

162. *Id.* at 144-46.

163. *Id.* at 152, finding XI.

164. *See* notes 90, 92 *supra*.

165. P. Karon, *Law, Fairness and Non-Institutional Credit in Mexico* (1976) (unpublished research paper in University of Arizona, Foreign Law Collection) [hereinafter cited as Karon].

166. *Id.* at 48.

equivalent of the United States "personal finance" company, was generally based on the lender's evaluation of the borrower's ability to repay the loan. Typically a lender would charge pilots of an airline ten percent per month, but charged the mechanics and maintenance personnel of the same company only five percent per month because he felt that since the pilots earned more "they could afford to pay higher interest."¹⁶⁷ *Mutatis mutandis* a large number of widows in the lending business would charge what the local priest suggested was a fair rate which would usually be substantially lower than that charged by male moneylenders.¹⁶⁸ These practices clearly do not allow for an easy determination of what most participants in the transaction with a view to their own advantage would regard as fair.

Finally it should be clarified that (F2) in its United States or any other version is not an altruistic standard. The distinction between (F1) and (F2) is not merely that (F1) protects brethren in a religious or kinship sense and (F2) protects those who participate in market transactions on a regular basis. The protection of (F2) is not the type of protection one would expect from a brother. It is predicated on the utilitarian perceptions of businessmen and not on the absolute duties of family members. Thus, while (F2) requires disclosure of facts that most participants would regard as essential, it does not require, as (F1) does, that the party with superior knowledge refrain from entering into a contract if the other party is too weak to profit or to prevent being damaged by the contract. Further, while (F2) is not as limited in its availability as (F1), its scope of protection is limited to market transactions involving regular participants. Therefore, the meaning of benefits and detriments in (F2) is solely that which prevails among regular participants in market transactions or in transactions undertaken with a view to their own advantage.

This is illustrated dramatically by recent decisions of courts in the United States interpreting the meaning of the warranty of merchantability in lawsuits brought by smokers who allegedly contracted cancer as a result of smoking cigarettes. The courts' definition of defective cigarettes was: "a product (cigarettes) that is in no way defective. They are exactly like all others of the particular brand and virtually the same as all other brands on the market."¹⁶⁹ The (F2) detriment that plaintiff would have had to prove in an action for breach of merchantability as a result of the alleged defective condition was not the one he actually suffered as a smoker, but that which he would have suffered had he been unable to sell the cigarettes as a retailer or wholesaler.

167. *Id.* at 49.

168. *Id.* at 50.

169. *Green v. American Tobacco Co.*, 391 F.2d 97, 110 (5th Cir. 1968) (Simpson, J., dissenting), *adopted as en banc opinion on rehearing*, 409 F.2d 1166 (5th Cir. 1969) (*per curiam*).

VIII. PROTOTYPE VERSIONS OF (F3): ENGLISH AND INDIAN USURY AND "NECESSITY" LAW

The study of English usury law reveals that well into the 16th century English courts, as had Roman adjudicators more than a thousand years earlier, distinguished the rights and duties of their own and foreign traders.¹⁷⁰ The determination of when a loan was usurious in English law depended in many instances on whether the borrower was a foreign merchant. If he was a foreign merchant, he was treated as a stranger in that the courts would not interfere with the collection of whatever interest rate was stated in the loan, or disguised loan, instrument. The White Book of the City of London (*Liber Albus*) records a typical complaint of usury by Ralph Cornwaile, an Englishman, against Walter Southouse, another Englishman.¹⁷¹ Southouse defended the action by alleging what was an absolute defense, *i.e.*, that the plaintiff was not the true borrower but was acting merely as a surety for the true borrower, Bartholomew Boseham, "a Lombard."¹⁷² Courts' protection of local merchants at the expense of foreigners was so great that reportedly in 1499 the Hansards refused to submit to the jurisdiction of English courts because "there might be great parcialitie in the said judges and favor in the examination of witnesses."¹⁷³

A contemporary replica of the preceding English version of (F3) is apparent in the Indian courts' application of Hindu law to credit transactions. India is, in the words of a leading scholar, "a land of personal laws."¹⁷⁴ Brahmins, Buddhists, Christians, Mohammedans and Parsees have distinct laws affecting every facet of life.¹⁷⁵ *Damdapat* is a principle of Hindu law which prevents the collection of interest on loans of money in excess, at any time, of the principal amount of the loan.¹⁷⁶ As a personal law principle, *Damdapat* is unavailable to non-Hindu debtors. A non-Hindu debtor cannot invoke the limitation upon interest when sued by a Hindu creditor.¹⁷⁷ The latter is then free to charge to non-Hindus whatever the traffic in a Hindu jurisdiction will bear.

170. W.W. BUCKLAND & A.D. MCNAIR, *ROMAN LAW AND COMMON LAW* 25 (2d ed. 1965): "The Roman solution of the problem started from the view that no foreigner was worthy of the *ius civile*, and went on to build up a body of law to regulate the relations between Romans and foreigners and between one foreigner and another."

171. *LIBER ALBUS* 339-44 (The White Book of the City of London) (London, H.T. Riley trans. 1861).

172. The jury did not believe defendant and found that "a contract of usury had been contrived and made by the aforesaid Walter . . . with the intent of usuriously taking from the said Ralph. . . ." *Id.*

173. A. ABRAM, *SOCIAL LIFE IN ENGLAND IN THE FIFTEENTH CENTURY* 47 (London 1909).

174. J. M. DERRETT, *RELIGION, LAW AND THE STATE IN INDIA* 39 (1968).

175. *Id.*

176. *Bapuroa v. Anant Kashinath*, [1946] Indian L. R. Nagpur 407, 413. On *Damdapat* see generally J.M. DERRETT, *INTRODUCTION TO MODERN HINDU LAW* 520-24 (1963).

177. See [1946] India L. R. Nagpur at 411.

Closely related to *Damdapat* in Hindu law is the principle of legal necessity; a principle conceived of to protect the rights of members of a family against frivolous dispositions of family property, even when the property is in the hands of a bona fide mortgagee or purchaser. According to this principle, a disposition of family property is valid when there is legal necessity to do so, and a legal necessity exists, for example, when a loan is not used for a purpose such as "purchasing spirituous liquors," supporting a mistress or "the vice of prostitution."¹⁷⁸ A court's finding that there was no legal necessity when the transaction was entered into could void the entire loan or equitably reduce its amount.¹⁷⁹ It does not matter to some Indian courts whether the creditor was not the original lender, mortgagee or a subsequent purchaser of the mortgage; if the property mortgaged was "ancestral family property," the purchaser-mortgagee is placed under a duty to determine the actual necessity.¹⁸⁰ More often than not when the sale or mortgage is impugned by a family member (*coparcener*) the ultimate validity of the transaction will depend on the court's finding that the alienee "made all proper inquiries to satisfy himself of the truth of the representations."¹⁸¹ Clearly, the protection of ancestral family property in Hindu law is at the expense of the innocent non-family member or stranger.

IX. COMMON CONTEMPORARY VERSIONS OF (F3)

A. *Anglo-American Law*

Unlike the English usury and Hindu *Damdapat* and necessity decisions, the most common contemporary versions of (F3) do not apply the stranger treatment to foreigners or non-members of the family or religion, however widespread such a basis of adjudication may be in informal administrative or extra-judicial decision-making.¹⁸²

The most common contemporary version of (F3) results from the courts' equation of occasional and regular participants in market transactions. Occasional participants are those who lack the market experience, knowledge of the

178. *Rajeshwar v. Nangiram Gangabishan*, [1932] 142 Indian Cases 242, 244 (C.J.C. Nagpur).

179. *Ram Khelawan v. Ram Nares Singh*, [1919] 51 Indian Cases 52 (Allahabad H.C.).

180. For an interesting discussion on the nature of custom and inalienable family property in Hindu law, see *Protap Chandra v. Jagadish Chandra*, [1925] Indian L. R. Calcutta 118, 125, cited in *Ram Khelawan*, [1919] 51 Indian Cases at 52, wherein the court stated: "It is incumbent upon the mortgagee suing to enforce his mortgage to prove not only the existence of the family necessity, but that there was necessity for borrowing at an onerous rate of interest."

181. *Bunku Behari De v. Bissewar Lal*, [1923] A.I.R. 575, 576 (Calcutta S.C. 1923)

182. An (F3) version of adjudication which is considerably widespread in contemporary informal administrative or extrajudicial decision-making in some developing countries is that of requiring a foreigner or stranger to pay a gratuity or bribe for adjudications to which family members or friends or compatriots of the adjudicator are entitled to as a matter of course.

terms of the contract or bargaining power to obtain an exchange of values which most regular participants would regard as fair. By assuming that these strangers are regular and knowledgeable participants, they are denied the benefits of (F1) and (F2). For it is assumed that they willingly entered into these transactions. Fairness then becomes the plain meaning of contracts regardless of how one-sided or exploitive they are. *L'Estrange v. Graucob*,¹⁸³ an English 1934 Kings Bench decision, provides a good illustration of this version of (F3). Plaintiff owned a suburban cafe and the defendant was a London manufacturer and seller of automatic slot machines for the sale of cigarettes. Defendant's agents met with plaintiff at her stepmother's to discuss the sale of a slot machine. Plaintiff was persuaded to buy the machine and defendant's agent produced a printed sales form labelled "sales agreement." In very small print the agreement contained the stipulation that "any express or implied, condition or statement or warranty statutory or otherwise not stated herein is hereby excluded."¹⁸⁴ Plaintiff paid an installment of the purchase price and discovered that the machine was inoperative. Plaintiff contended that she was induced to sign the contract by the misrepresentation that it was a mere order form and that she knew nothing of the small print conditions of the sale. The lower court judge held for the plaintiff; but, on appeal, the Kings Bench Division held that there was no evidence of misrepresentation before the lower court, and, equating plaintiff's allegation to an imputation of fraud, it held: "the plaintiff having put her signature to the document . . . cannot be heard to say that she is not bound by the terms of the document because she had not read them."¹⁸⁵ Maugham, L. J., stated that he regretted his decision but, being bound by "legal rules," he could not decide otherwise.¹⁸⁶ He concluded that it was irrelevant that plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms.¹⁸⁷ He added that he wished that the contract had been in a simpler and more usual form, and that it was unfortunate that the important clause excluding conditions and warranties was in such small print, but that the appeal was proper.¹⁸⁸

It is important to note how the majority opinion in this case distinguished the rule in the "railway ticket" cases from its own rule in the instant case:

In cases in which the contract is contained in a railway ticket or other unsigned document it is necessary to prove that an alleged party was

183. [1934] 2 K.B. 394.

184. *Id.* at 402.

185. *Id.* at 404.

186. *Id.*

187. *Id.* at 406-07.

188. *Id.* at 405, 407.

aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then in the absence of fraud, or I will add misrepresentation, the party signing is bound, and it is wholly immaterial whether he had read the document or not. . . .¹⁸⁹

Since an awareness of the terms of the contract is required by the court in the railway ticket cases and is dispensed with in the case in which the purchaser of the goods has signed the contract, the purchaser's signature carries the same weight as an awareness of the terms of the contract in the eyes of the court.¹⁹⁰ However, in order to presume that a signature implies such an awareness, the court had to assume that either plaintiff was actually aware of the contents of the contract, which was inconsistent with the court's own version of the facts, or that plaintiff constructively knew about such contents. This constructive knowledge, however, can be imputed only to a regular or knowledgeable purchaser of automatic slot machines. Only regular participants in that trade could be judged to be aware of conditions and disclaimers presumably so common as not requiring a clear statement or a readable type. This unwarranted assumption therefore resulted in an (F3) treatment. While a brotherly merchant would have refrained from such a transaction and a regular participant would have required that a product sold on what amounts to a highly risky or "as is" basis bear a market price consistent with such a basis, the plaintiff, as a stranger, was denied the benefits of such bargaining. As stated by Official Comment 4 to U.C.C. § 2-313, in determining what the parties have agreed upon "good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation."¹⁹¹

The determination of what would have been the presumed bargain between regular participants in the transaction while ostensibly searching for the "root of the contract" or for the "fundamental terms of the contract," prompted other English courts to disregard the *L'Estrange* decision.¹⁹² In *Karsales Ltd. v.*

189. *Id.* at 403.

190. An interesting parallel to the King's Bench "knowledge by signature approach" is the ritualistic solution provided by the Italian Civil Code of 1942, Article 1341. CODICE CIVILE art. 1341 (Italy 1942). This code requires a specific approval (usually by signature or initial) for "1. conditions limiting liability of a party who has prepared the general conditions, . . ." On this article and its interpretation in Italian law see Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. LAW 1 (1962).

191. U.C.C. § 2-313, Comment 4.

192. Notably, see *Glynn v. Margetson & Co.*, [1893] A.C. 351 (where it was held that if a clause was inconsistent with the main purpose of the contract that clause must be rejected). More recently, see *Alexander v. Railway Executive*, [1951] 2 K.B. 882 (where Lord Devlin (then Devlin, J.) coined the term "fundamental breach"); and *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.*, [1970] 1 Q.B. 447. But cf. Coote, *The Effect of Discharge by Breach on Exception Clauses*, 28 CAMBRIDGE L.J. 221 (1970).

Wallis,¹⁹³ a standard hire purchase (conditional sale) clause stating, "No conditional warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein,"¹⁹⁴ was disregarded by the court where the vehicle in question was a mere shell. In the court's language:

Exemption clauses do not avail him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the root of the contract, he cannot rely on the exemption clause. . . .¹⁹⁵

The basic problem of treating contractually weak or inexperienced parties as if they were experienced regular market participants was perceived by the U.S. Supreme Court in *New York Central R.R. v. Lockwood*,¹⁹⁶ an 1873 decision. As stated by Justice Bradley:

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out, and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading or sign any paper the carrier presents; often indeed without knowing what one or the other contains. In most cases he has no alternative but to do this or abandon his business. . . .¹⁹⁷

In 1941, Justice Frankfurter expressed a similar view in his dissent in *United States v. Bethlehem Steel Corporation*,¹⁹⁸ questioning; "Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?"¹⁹⁹ Yet in 1960, Karl Llewellyn assessed United States courts' attitudes toward what he termed "form pad" contracts²⁰⁰ as follows:

For the story is quick to tell, though the cases must run into the thousands and with no reckonability anywhere in sight. Unpredictably, they read the document for what it says, drop a word about freedom of contract, or about opportunity to read, or improvident

193. [1956] 2 All E.R. 866, 1 W.L.R. 936 (C.A.).

194. *Id.* at 868, 1 W.L.R. at 937-38.

195. *Id.* at 868-69, 1 W.L.R. at 940-41.

196. 84 U.S. (17 Wall.) 357 (1873).

197. *Id.* at 379.

198. 315 U.S. 289 (1942).

199. *Id.* at 326 (Frankfurter, J., dissenting).

200. K. LLEWELLYN, *THE COMMON LAW TRADITION* 362-71 (1960).

use of the pen, or about powerlessness of the court to do more than to regret, or the like, and proceed to spit the victim for the barbecue. With equal unpredictability they see the lopsided document as indecent and evade it. . . .²⁰¹

Are Llewellyn's and Frankfurter's assessments reconcilable? Reconciliation is an order when one understands that Justice Frankfurter's principle "of universal application" was, despite appearances, truly addressed to the "limited" universe of actual or potential regular participants in the market place as suppliers of goods and services, buyers thereof and ultimately, also, as potential competitors of either or both. The plaintiff in *Bethlehem Steel* was, after all, the United States Government and the gist of its cause of action was defendant's taking advantage of its market position and of wartime duress. While Justice Frankfurter may have been correct when chastising his colleagues for their ironic denial of the likelihood of governmental duress,²⁰² he himself could not have denied the regularity of the United States Government participation in the procurement business.

In fact where contractual onesidedness is concerned, courts in the United States until quite recently, have been much more willing to aid the actual or potential regular market participant in distress than the occasional participant. This attitude was influenced greatly no doubt by the turn of the century enactment of federal anti-trust and unfair trade legislation, followed by widespread state statutory emulation. The consumer protection trend, as indicated earlier in connection with (F1), is of much more recent vintage having come into being in the 1960s after Llewellyn's assessment.

B. German Law

One of the most significant findings in Dawson's lucid account of pre-Second World War German fair exchange law was that the ideal of a fair exchange was inseparably related to the problems of disparity in bargaining power.²⁰³ And even though only three types of disparity were recognized in the German Civil Code of 1900, *i.e.*, necessity, thoughtlessness and inexperience, courts were given considerable latitude in defining these terms.²⁰⁴ A temporary economic stringency, if sufficiently severe, might, in the eyes of German courts, destroy the bargaining power of a person possessed of considerable financial resources.²⁰⁵ A simple workman, as opposed to an experienced farmer-merchant, was held sufficiently inexperienced to avoid a purchase of fertilizer at an excessive price.²⁰⁶

201. *Id.* at 364.

202. 315 U.S. 330-31 (Frankfurter, J., dissenting).

203. Dawson, *supra* note 44, at 62.

204. *Id.*

205. *Id.*

206. *Id.* at 63 n.177.

In addition to the above cases of "subjective lesion," Dawson found other decisions predicated on Article 138 of the German Civil Code prohibiting contracts in conflicts with "good morals" or on Article 242 requiring good faith in the performance of contracts.²⁰⁷ Restraints on retailers' economic freedom imposed by the manufacturers-wholesalers of beer,²⁰⁸ transfers of all of the debtor's working assets as security to his creditor²⁰⁹ and harsh stipulations for penalties or forfeitures,²¹⁰ among others, were held to be in the nature of *Knebelungsvertrag* (which Dawson translates as "a throttling contract") by which the power of capital was used to enslave the energies of the economic inferior.²¹¹

A post-World War II study by Lenhoff indicates that if anything German courts have broadened the scope of their findings of inequality:

A term and condition which a customer (who is neither a merchant nor a member of a class which may be deemed familiar with such a term because of longer business relations or particular business experience) might not reasonably expect to find in print on documents will be thrown out by a court.²¹²

C. *Latin American Law*

As indicated earlier in the discussion of (F1), despite the availability of statutory rules quite similar to those used by German courts to insure a fair exchange and to redress the inequality of bargaining power, Mexican courts have seldom used these provisions.²¹³ Not only are the decisions based on "subjective lesion" very few and highly restricted in nature, but decisions utilizing the "good faith" or "good morals" principles in instances of exploitation of a contractual advantage are equally rare. Argentine courts, on the other hand, seem more willing to evaluate the effects of a gross disproportion of bargaining power in "adhesion" contracts. As stated by an Argentine appellate judge:

In our law, the absence of regulation of contracts of adhesion does not prevent the judicial finding of the objective-subjective lesion foreseen by Article 954 of the Civil Code especially where there are terms or conditions which the adhering party could not have found

207. *Id.* at 64-69.

208. *Id.* at 65.

209. *Id.* at 66.

210. *Id.*

211. According to Dawson, the concept of *Knebelungsvertrag* "was used to invalidate an agreement between father and daughter, by which the daughter conferred on the father a complete power of disposition of all her property." *Id.* at 67-68.

212. Lenoff, *Contracts D'Adhesion in German and Austrian Law*, 1956 A.B.A. COM. REP. COMP. L. 121, 124.

213. See text accompanying notes 39-41 *supra*.

out about even by employing due diligence. [Neither does our law prevent] a reading in favor of the adhering party when the stipulations are unclear.²¹⁴

It should be noted, however, that the court conditioned the finding of lesion upon an absence of the knowledge obtainable by the employment of due diligence. This condition brings this Argentine decision closer to the King's Bench decision in *L'Estrange*²¹⁵ than to the German decisions reviewed by Dawson and Lenhoff.²¹⁶

An additional difference between German and United States decisional law on the one hand and Latin American decisional on the other is that Latin American anti-trust and unfair competition law is virtually in its infancy. Thus the weaker market participant is frequently at the mercy of the stronger one. As is apparent in a study by Professor Furnish on the enforcement of Chilean anti-trust law,²¹⁷ even in a jurisdiction where an "anti-monopoly" statute was enacted and an administrative machinery was set up to enforce it, restraints of retail trade comparable to those imposed upon German beer vendors at the turn of the century have gone unredressed.²¹⁸

X. OTHER (F3) VERSIONS

(F3) results not only from an unwarranted equation between regular and occasional participants in market transactions, but also from a failure to apply (F2) to participants in contractual and third party transactions. From an (F2) vantage point the purchaser or mortgagee of Mexican real property, who relies on a recording in the land registry which shows his grantor as having good title but fails to discover an infirmity that could only have been discovered by a knowledgeable and exhaustive search, is a stranger.²¹⁹ The Costa Rican purchaser or mortgagee of personal property who advanced value

214. *Oscar Avila v. El Roll S.A.*, CN Civil, Sala C, 30 de septiembre de 1975, [1976] II La Ley 127, 131. This case involved the sale of a flat on a "projected" price basis inserted in a standard form (*boleto*) type of contract. *See also* *Gonzalez Betancourt v. Julio E. Gomez S.R.L.*, CN Paz, Sala IV, 4 de julio de 1952, [1953] 67 La Ley 423. *But cf.* *Ponce Roldán v. Toscani*, Suprema Corte de Tucuman, set 1, [1944] 35 La Ley 792 (where an adhesion contract requiring the new concessionaire of a municipal service to pay severance owed by a former concessionaire was upheld). Of special interest in this case is the fact that the defendant concessionaire was attempting to avoid being treated as a merchant, presumably because in an environment which was rapidly turning highly protective of labor claims, merchants would likely be saddled with (F1) duties toward their employees. The key factual finding in this case, however, was that in the concession deed there appeared an account labelled "severance pay expenses" which the court assumed referred to the labor law obligations claimed by plaintiffs. *Id.* at 793.

215. *See* text accompanying note 183 *supra*.

216. *See* text accompanying notes 203-12 *supra*.

217. Furnish, *Chilean Antitrust Law*, 19 AM. J. COMP. L. 464 (1971).

218. *Id.* at 473-88 (especially the discussion of the *Flour Milling Industry* case).

219. *See* note 140 *supra* and accompanying text.

after determining the absence of an adverse recording in the Registry of Pledges, only to be outranked by another purchaser or mortgagee whose "title" had been "presented" (but not recorded) earlier, also is treated as a stranger.²²⁰ Both parties advanced value which most participants would have deemed sufficient for the acquisition of rights, both relied on what most participants would have regarded as sufficient notice, and yet neither was protected.

Mutatis mutandis, as a result of the unwillingness of Latin American courts to apply (F2) to relationships such as that between a minority stockholder and the corporation, this market participant is similarly treated as a stranger.²²¹ Finally, (F3) can result also from a misapplication of (F1) when a third party, without involvement or knowledge in an underlying contractual relationship, is made responsible for the contractual and extracontractual (F1) duties of one of the parties to that contract. This situation is likely to arise in jurisdictions where the protection of consumers or weak parties totally overrides considerations of contractual privity. An extreme but nonetheless helpful example of a misapplication of (F1) resulting in (F3) is provided by a jury award in a 1977 Texas County court decision, *Insurance Agency Managers v. Gonzalez*.²²² Simplified, the facts are the following: B, a consumer-borrower procured a home improvement loan from L, a commercial lender, in order to finance a construction contract with C, a builder. I, an insurer, provided L with a credit policy that guaranteed payment of B's loan in the event of default. B defaulted on the loan alleging that C had improperly performed his construction contract and that L should not have paid C. I paid L the amount lent to B and sued B as a holder-indorsee of B's promissory note to L. B counterclaimed alleging the underlying breach of contract and also L's violation of the Truth-in-Lending Act. B won both on his defense and counterclaim and despite the fact that B's note was for \$6,000, the jury awarded B \$14,000 against I.²²³

From an (F2) vantage point, I's liability, if any, would have been related to his having appropriated value from L or B in gross disproportion to that which he had contributed. In the absence of any such appropriation by I, I's liability to B, for a sum far in excess of that evidenced in the note, is reminiscent of the "stranger" treatment given to foreign merchants in medieval England.²²⁴

220. See note 139 *supra* and accompanying text.

221. For an illustration of the treatment of minority stockholders in Costa Rican law, see Kozolchik, *Toward a Theory of Law in Economic Development: The Costa Rican USAID-ROCAP Law Reform Project*, 1971 LAW & SOC. ORDER 681, 710-13; see also Kozolchik, *Commercial Law Recodification and Economic Development in Latin America*, 4 LAW. AMERICAS 189, 192 (1972) (where Colombian corporate abuses of minority rights and legislative responses thereto are described).

222. *Insurance Agency Managers v. Gonzalez*, No. 289985 (Harris County Ct., Tex., filed Dec. 8, 1977).

223. *Id.*

224. See notes 171, 173 *supra* and accompanying text.

XI. COMPARATIVE EVALUATION

The main difference between the historical or prototype versions and the common contemporary versions of (F3) is the following: The prototype version deliberately singles out the stranger, whether family member or a foreigner, for the stranger treatment. By contrast, the contemporary versions apply the stranger standard as a result of an unwarranted equation between market and nonmarket participants and by failing to apply (F2) to market transactions where parties relied on such a standard. This failure could be purely the result of the courts' reliance on abstract reasoning inconsistent with (F2), such as with contractual and third party rights decisions by Latin American courts, or it could be the product of the courts' desire to protect consumers or weak parties at the expense of third parties as with the Texas County Court jury award in *Gonzalez*.

From a comparative legal standpoint it is apparent that due to the erratic application of (F2), and to the absence of consumer protection and anti-trust legislation and court decisions, (F3) is a much more widespread standard of adjudication in Latin America than it is in Germany or the United States.

XII. CONCLUSION

The preceding examination of commercial decisions has served the purpose of identifying what courts deem as fair in commercial adjudication. It is clear that the reliance on the three identified standards of models is not prompted by the jurisdiction's allegiance to the "civil" as opposed to the "common law" type of decision-making. The perception of what is a fair treatment of a third-party purchaser or mortgagee in Mexican land registry law decisions is quite unlike those in the civil law jurisdictions which served as Mexico's legislative models. It is much closer to that in the Hindu law decisions based on "legal necessity." Court attitudes toward fairness proved more important than the applicable norm's original legislative purpose or pedigree.

The article demonstrates that the key judicial attitudes are those toward membership or participation in two seminal associations. The first is the brotherly association, which is intended primarily for the preservation of the family, understood in terms of kinship, religious or political affiliation. The brotherly relationship imposes the highest conceivable duties upon the brethren-participants and very few if any duties toward non-brethren or participants. The second is the trade or market type of association, which imposes lesser duties upon its members or participants than does the brotherly association. However, it broadens the criteria which allow participation in the protected relationship so as to include anyone capable of exchanging value, with value being defined by participants themselves. The relationship with a stranger imposes no duties on the participants of the brotherly or market associations toward the stranger, but because of the greater ease with which one can become a participant in a market than in a brotherly type of associa-

tion, the market association has fewer strangers than does the brotherly association. Thus, fairness in commercial adjudication can be defined as a criterion of adjudication based upon the duties borne by the participants in the brotherly or market type of association as a result of their participation.

The fact that the most common contemporary versions of (F1) require the highest duties from trustees, attorneys or merchants with superior knowledge or bargaining power instead of from tribal brethren is no doubt yet another confirmation of Summer Maine's asserted progression from "status" to "contract"²²⁵ or Tonnies' from *Gemeinschaft* to *Gesellschaft*.²²⁶ Similar confirmation is found in the fact that the most common stranger in the reviewed commercial law adjudication is no longer the foreigner but the occasional and weak participant in market transactions and in the prevalence of (F2) in jurisdictions with developed market economies. But while the progression from status to contract is borne out by this article it is also true that if status is defined not merely as membership in a family or tribe, but as the participation in any of the basic relationships that characterize the two associations, status then continued to be the crucial factor in arriving at a fair decision.

The fact that courts in developing countries such as Argentina, Chile, Colombia, Costa Rica and Mexico tend to apply (F3) to market transactions either by choice or by not applying (F2) with greater frequency than courts in Germany and the United States is, in itself, significant. However, a showing of cause and effect relationship between development and commercial decision-making trends would require much more data than presently available. Nevertheless, the connection between (F3) and a weak or inefficient market is obvious: the larger the number of strangers, the smaller the number of willing participants in market transactions. (F3) therefore can be regarded as a blueprint for underdevelopment. It is apparent also that where there is a widespread utilization of (F2) accompanied by a reliance on (F1) to encourage participation in fiduciary relationships there is a greater willingness to participate in ordinary market as well as in fiduciary relationships.

The preceding conclusions highlight the value of the identified standards or models of fairness. First of all they serve as valid, albeit synthetic, descriptions of the determinants of commercial adjudication in the developing and developed market economies studied. Therefore, they can be of considerable assistance in understanding what courts do and why they do it. Such an understanding facilitates a more orderly and consistent application of rules and principles of interpretation. Moreover, by becoming increasingly aware of the intrinsic limitations of each standard and of their necessary interaction, the legal analyst will be able to formulate concepts and rules more consistent with relationships essential in the furtherance of the seminal associations.

225. S. MAINE, *ANCIENT LAW* 163-65 (10th ed. 1963).

226. F. TONNIES, *GEMEINSCHAFT UND GESELLSCHAFT* (1887), as translated, C. P. LUMMIS, *COMMUNITY AND SOCIETY* (1963).